162 U.S. 512

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 170.

THE CENTRAL PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEVADA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

FILED OCTOBER 5, 1892.

(15,159.)

Transcripts
of
Records
1895

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Supreme Court U. States

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INDEX.

	Original.	Print.
Writ of error	1	1
Petition for allowance of writ, &c	3	2
Citation	13	6
Bond	15	6
Bond, allowed as supersedeas	18	8
Transcript from district court, Lander county	19	8
Amended complaint	20	9
Answer	25	11
Statement on motion for a new trial	42	18
Decision	44	19
Statement on motion for a new trial continued	52	22
Notice of motion for a new trial	57	24
Order overruling motion for new trial	58	25
Notice of appeal	59	26
Undertaking on appeal	60	26
Clerk's certificate	65	28
Order submitting cause	67	29
Stipulation for submission, &c	68	29
Syllabus of opinion	69	30
Opinion	70	31
Judgment	73	37
Assignment of error	74	38
Clerk's certificate	78	39

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 24, 1895.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the State of Nevada, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nevada, before you, between The State of Nevada, plaintiff, and The Central Pacific Railroad Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Central Pacific Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second
2 Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal U. S. Circuit Court, Ninth Circuit, District of Nevada.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at the city of Washington, this sixth day of September, A. D. 1892, and of the year of our Independence the one hundred and seventeenth.

T. J. EDWARDS,
Clerk U. S. Circuit Court, 9th Circuit & District of Nevada.

By reason of the absence and inability of the Hon. Chas. H. Belknap, chief justice of the supreme court of the State of Nevada, the application for the allowance of a writ of error was presented to me as one of the associate justices of the said supreme court, and said writ of error is allowed by me, as prayed for in said application, this the 6th day of September, A. D. 1892.

R. R. BIGELOW,
Associate Justice of the Supreme Court of the State of Nevada.

(Endorsed:) Filed September 6, 1892. Joe Josephs, clerk supreme court Nevada.

3 *Petition for Allowance of Writ and Issuance of Citation.*

In the Supreme Court of the State of Nevada.

CENTRAL PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE STATE OF NEVADA, Defendant in Error.

Petition for allowance of writ of error in action No. 1356, supreme court series, and being an action brought to recover judgment against plaintiff in error by defendant in error for the taxes of the year 1888.

To the Hon. Charles H. Belknap, chief justice of the supreme court of the State of Nevada, or, in case of his absence or inability, to the Hon. R. R. Bigelow, one of the associate justices of said supreme court:

Your petitioner, The Central Pacific Railroad Company, as plaintiff in error, would respectfully show the following: That this action was originally commenced in the district court of the State of Nevada, in and for the county of Lander, upon the 21st day of December, 1888, by The State of Nevada as plaintiff against The Central Pacific Railroad Company as defendant, to recover a judgment for certain taxes alleged to be due from plaintiff in error to
4 defendant in error upon certain property described in the record herein, including the taxes claimed to be due upon 122,824 acres of unpatented lands, being a portion of the lands embraced within the limits of the grant made by the Government of the United States to the Pacific railroads.

That said 122,824 acres were assessed for said year 1888 at fifty cents per acre.

That the tax levy for said year 1888 was $3.80 on each $100 valuation.

That said defendant in error, as such plaintiff, did, upon the 3d day of January, 1891, file an amended complaint in said action in said district court, and that said plaintiff in error, as such defendant, did thereafter and in due time file its answer to said amended complaint, and did thereafter and in due time file its amendment to its said answer.

That said pleadings are all herein specially referred to and are made a part thereof and will comprise in part the record upon the allowance of the writ of error herein applied for.

That in said amendment to the answer of the plaintiff in error it was made to appear that the costs of surveying, sel-cting, and
5 conveying 122,824 acres of the lands described in said amended complaint had never been paid by the plaintiff in error to the Government of the United States, and that the same were at the commencement of this action still due and unpaid.

That thereafter, to wit, upon the 29th day of July, 1891, said cause came on for trial in said district court; whereupon the parties

to said action submitted and caused to be filed in said cause an agreed statement of facts, constituting all the evidence in said cause.

That in said agreed statement of facts it was stipulated and agreed that of the lands described in said amended complaint 131,386 acres were surveyed, but unpatented, and that the costs of surveying, selecting, and conveying 122,824 acres thereof had never been paid.

That, said cause having been taken under advisement, the said district court did thereafter and upon the 25th day of February, 1892, cause to be filed its decision and order for judgment, and that thereupon a judgment was rendered and entered against plaintiff in error and in favor of defendant in error for the sum of $3,642.17, together with penalties and costs; which said judgment included

6 all taxes claimed and alleged to be due from plaintiff in error to defendant in error upon said 122,824 acres of lands for the year 1888.

That plaintiff in error thereafter, to wit, upon the 3d day of March, 1892, made application to said district court for a new trial in said cause and filed and served its statement under the rules and practice in the State of Nevada, and that thereafter said district court, upon the 12th day of March, 1892, made and entered its order denying the application of plaintiff in error for a new trial therein.

That plaintiff in error in its specifications and assignments of error, and for the purpose of showing wherein such judgment and decision were not supported by the evidence, allege the following, to wit: "That said decision and judgment are each against law and the evidence, as contained in said agreed statement of facts, and such evidence is insufficient to justify or sustain the same or either of them, in this: That appellant was and is not liable for the taxes claimed upon the said 122,824 acres of land, for the reason that the Government of the United States has never been paid the costs of

7 surveying, selecting, or conveying the same, and the same still remains unpaid, and for the further reason that the State of Nevada has never by its proper legislative department accepted the terms nor conditions contained in that certain act of Congress entitled 'An act to provide for taxation for railroad-grant lands and for other purposes,' approved July 10, 1886.

"That said decision and judgment are each against law in this, that the State of Nevada has never by its proper legislative department provided by appropriate legislation for the protection and security of the lien of the United States for the costs of surveying, selecting, and patenting said 122,824 acres of land under the provisions of said act of Congress."

That upon said application for a new trial in said district court plaintiff in error contended that under the provisions of said act of Congress said 122,824 acres of land were not subject to taxation, for the reason that there had been no legislative acceptance by the State of Nevada of the terms and conditions imposed in and by said act of Congress.

That before said lands could be made the subject of taxation it

was necessary that the State of Nevada, by appropriate legis-
8 lation, should protect the lien of the Government of the United States for the costs of surveying, selecting, and conveying said land.

That the grant of the power to tax said land by the State of Nevada was conditional, dependent upon the acceptance of the terms and conditions imposed in and by said act of Congress, and that the State of Nevada had never, by any means whatever, accepted the terms and conditions imposed by said act of Congress.

That said judgment and decision in said district court were adverse to the contention of plaintiff in error, and said district court did hold, decide, and adjudge that said 122,824 acres were subject to taxation, notwithstanding the provisions of said act of Congress.

That thereafter said plaintiff in error took and prosecuted an appeal to the supreme court of the State of Nevada, and that the judgment and decision of said district court were affirmed in said supreme court upon the 8th day of August, 1892.

That said judgment of affirmance in said supreme court was a final judgment upon the merits in the court of last resort in said State of Nevada.

That there is and was directly involved in said action the right and power of the State of Nevada or of any county in said
9 State of Nevada to levy, enforce, or collect any tax for State, county, or municipal purposes upon any of said 122,824 acres of land, and that there was also involved in said action a claim of exemption and immunity from taxation as to said lands under the provisions of said act of Congress, and by reason of the fact that the costs of surveying, selecting, and conveying said lands had never been paid, and by reason of the further fact that the terms and conditions imposed by said act of Congress had never been accepted by the legislative authority of the State of Nevada.

That plaintiff in error, for the purpose of showing that a Federal question was and is presented in this cause and there is directly involved herein a construction of said act of Congress, hereby refers to and makes a part of this petition points 1, 2, and 3 of the syl-abus prepared by the associate justice of the supreme court rendering said decision of affirmance, to wit: "Since the act of Congress of July 10, 1886, the surveyed but unpatented lands within the grant to the Central Pacific railroad are no longer exempt from taxation by reason of the Government lien thereon for the costs of surveying, &c. The conditions contained in that act to the effect that the lien shall continue and that the United States may become a pre-
10 ferred purchaser at any tax sale of such land control such sales, and there is no necessity for a legislative acceptance by the States of the conditions of the act."

"2. Congress, having full control over the public domain, may make it subject to State taxation upon such conditions as are deemed proper, and then, if so taxed, it must be done subject to those conditions.

"3. The act of July 10, 1886, is a grant to the States of the right to tax lands in which the United States still has such an interest

as renders them exempt, and, being beneficial, its acceptance by the grantee will be presumed."

Plaintiff in error, for the purpose of further showing that a Federal question was and is presented in this cause, and that there is directly involved herein a construction of said act of Congress, hereby refers to and makes a part of this petition the following extract from the decision of the said supreme court, to wit: "Again it would seem that the fact that these lands have been assessed by the State, and that the State is now in court endeavoring to enforce that assessment, which without this act it clearly had no right to assess, should of itself be considered an acceptance of the conditions therein contained."

11 Therefore the plaintiff in error claims and asserts that the construction of said act of Congress, to wit, "An act to provide for taxation of railroad grant lands and for other purposes," approved July 10, 1886, is and was directly involved in this action, and that the question of the right, immunity, and privilege of plaintiff in error to be relieved from taxation under the terms and conditions of said act of Congress *were* directly presented as to said lands, and that said judgment of affirmance was adverse to plaintiff in error, and that said supreme court decided against the contention of plaintiff in error; all of which will fully appear by the record in said action in this court.

The plaintiff in error, desiring to have the said judgment and decision of affirmance in said supreme court reviewed by the Supreme Court of the United States, respectfully petitions your honor to allow said action and the record therein to be taken and removed to said Supreme Court of the United States, upon a writ of error issued therefrom to this court, and that your honor sign and issue a citation therein as required by law in order that your petitioner may secure such final decision and judgment in said Supreme Court

12 of the United States as in law and equity it is entitled to.

Plaintiff in error further alleges that said judgment in said district court, together with said judgment of affirmance in said supreme court of the State of Nevada, was a personal judgment and not a judgment *in rem*.

Wherefore your petitioner prays that it may be allowed by your honor to file said writ of error, and that a citation may issue as is by law in such cases required, and that the bond herewith tendered may be accepted and approved, and that the same may be taken and held to be supersedeas bond in these proceedings, and that an order be made staying execution pending such writ of error.

CENTRAL PACIFIC RAILROAD COMPANY,
Plaintiff in Error.

BAKER, WINES & DORSEY,
Attorneys for Plaintiff in Error.

By reason of the absence and inability of the Hon. Chas. H. Belknap, chief justice of the supreme court of the State of Nevada, the above petition for the allowance of a writ of error was presented

to me as one of the associate justices of said supreme court,
13 and said writ of error is allowed by me as herein prayed for this the 6th day of September, A. D. 1892.

R. R. BIGELOW,
Associate Justice of the Supreme Court of the State of Nevada.

(Endorsed:) Filed September 6, 1892. Joe Josephs, clerk supreme court, Nevada.

Citation.

In the Supreme Court of the State of Nevada.

THE CENTRAL PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
THE STATE OF NEVADA, Defendant in Error.

To The State of Nevada, the above-named defendant in error, and to the attorney of record, Hon. J. D. Torreyson, attorney general:

You are hereby cited and admonished to be and appear at a session or term of the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the supreme
14 court of the State of Nevada, wherein The Central Pacific Railroad Company, a corporation, is plaintiff in error and you, The State of Nevada, are the defendant in error, to show cause, if any there be, why the decision and judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Witness my hand, at Carson City, Nevada, this 6th day of September, A. D. 1892.

R. R. BIGELOW,
Associate Justice of the Supreme Court of the State of Nevada.

Service by copy of the foregoing citation admitted this 6th day of September, A. D. 1892.

JAMES D. TORREYSON,
Attorney General of the State of Nevada and Attorney for the Defendant in Error.

(Endorsed:) Filed September 6, 1892. Joe Josephs, clerk supreme court of Nevada.

15 *Supersedeas Bond.*

In the Supreme Court of the United States.

CENTRAL PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE STATE OF NEVADA, Defendant in Error.

Know all men by these presents that we, The Central Pacific Railroad Company, as principal, and D. L. Bliss and J. R. Bradley,

as sureties, are held and firmly bound unto the State of Nevada in the sum of twelve thousand five hundred dollars ($12,500) in the lawful money of the United States of America, to be paid to the said The State of Nevada or its proper assigns; for the true payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors, and assigns, jointly, severally, and firmly, by these presents.

Sealed with our seals and dated this sixth day of September, 1892.

The condition of the above obligation is such that whereas the said Central Pacific Railroad Company, as plaintiff in error, has applied for, obtained, prosecuted, and will prosecute a writ of error, directed to the Supreme Court of the United States, to reverse
16 the judgment and decision rendered and entered in and by the said supreme court of the State of Nevada in the above action, in which said action the defendant in error was the plaintiff and the plaintiff in error was the defendant, and in which said action there was a judgment rendered and entered in favor of said defendant in error and against said plaintiff in error for the sum of three thousand six hundred and forty-two and $\frac{17}{100}$ dollars ($3,642.17), being the amount of the principal of said judgment, with ten per cent. (10%) penalty and twenty-five per cent. (25%) statutory damages thereon, together with costs of suit, including district attorney's fee, amounting to ten hundred and twenty and $\frac{90}{100}$ dollars ($1,020.90), with legal interest from the 25th day of February, 1892, said judgment having been affirmed and entered in said supreme court upon the eighth day of August, 1892:

Now, therefore, if the said Central Pacific Railroad Company, as such plaintiff in error, shall duly prosecute its said writ of error in the Supreme Court of the United States to effect and shall answer to and pay all damages and costs if it shall fail to make good its said writ and plea, and shall also pay the full amount of said judgment, with all interest, penalties, and costs, together with just dam-
17 ages for delay, and all costs and interests by reason of said writ of error, then this obligation shall be void and of no effect; otherwise it shall remain in full force against us, jointly and severally, both in law and in equity.

D. L. BLISS. [SEAL.]
J. R. BRADLEY. [SEAL.]

Sealed and delivered in presence of—
JOE JOSEPHS.

UNITED STATES OF AMERICA, } ss:
State of Nevada, County of Ormsby, }

D. L. Bliss and J. R. Bradley, as sureties on the above and foregoing bond and obligation, being duly sworn, each for himself and not one for the other, says: I am a citizen and resident of the State of Nevada and a freeholder and householder therein; that I am worth the amount specified in the said bond or obligation as the penalty thereof, to wit, the sum of twelve thousand five hundred dollars, in

property situated in said State of Nevada, over and above all my debts and my liabilities, exclusive of property exempt from
18 attachment, execution, of forced sale.

D. L. BLISS.
J. R. BRADLEY.

Sworn to before me and subscribed in my presence this the 6th day of September, 1892.

[Seal of Supreme Court of Nevada.]

JOE JOSEPHS,
Clerk Supreme Court, State of Nevada.

The above and foregoing bond is hereby approved and is also approved as a supersedeas bond, and remittitur will be stayed pending writ of error.
September 6, 1892.

R. R. BIGELOW,
Associate Justice of the Supreme Court of the State of Nevada.

(Endorsed:) Filed September 6, 1892. Joe Josephs, clerk supreme court Nevada.

19 *Complaint.*

In the Supreme Court of the State of Nevada.

In the District Court of the State of Nevada in and for the County of Lander.

STATE OF NEVADA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } (No. 1876.)

The above action was commenced in the above court by the filing of an original complaint upon the 21st day of December, in the year 1888.

That a summons was regularly issued upon said complaint and served upon said defendant. That thereafter, upon the 3d day of January, 1891, the plaintiff, by leave of court, filed an amended complaint, the same being as follows, to wit:

20 STATE OF NEVADA, }
County of Lander. }

In the District Court of the State of Nevada in and for the County of Lander.

THE STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY AND THE PROPERTY, REAL Estate, and Improvements in the State of Nevada, County of Lander, Described as Follows, to wit:

Possessory claim to the following-described tracts and parcels of land, to wit:

("Here follows the description of the property, which is the same in the transcripts of these cases on the appeal of the State of these cases, and to which reference is hereby made and made a part hereof, the land in said descriptions being described by legal subdivisions.")

In the foregoing enumeration of lands the several townships and ranges, are townships north, and ranges east, of Mount Diablo base and meridian.

28.39 miles of railroad, in Lander county, State of Nevada, owned by the Central Pacific Railroad Company, and known as the Central Pacific railroad, including cars, couplings, spikes, ties,
21 bridges, culverts, cuts, fills embankments and the land owned by the right of way of said company, commencing at a point on the western boundary of Lander county, where stands a monument established by the surveyor general of the State of Nevada, and extending in an easterly direction 28.39 miles, to a monument established by said surveyor general.

Also $\frac{76}{100}$ miles of railroad, in Lander county, State of Nevada, owned by the Central Pacific Railroad Company, and known as the Central Pacific railroad, including rails, couplings, spikes, ties, bridges, culverts, cuts, fills, embankments, and the land owned by the right of way of said railroad, commencing at the last beforementioned monument, and extending in an easterly direction 4,050 feet to eastern boundary of Lander county.

Also 29.15 miles of telegraph line, owned by said company in said county, alongside of and extending the entire length of said railroad, in said county.

Also structures, buildings and improvements of said railroad company, in said county, consisting of the following, to wit:

One building used as a depot, and known as the Central Pacific railroad depot in Battle Mountain, in said county, and water tank, pumping engine, cattle corrals, and other improvements in Battle Mountain, in said county.

22 Also improvements at Argenta and all other points in said county.

Also Lander county's proportion of the rolling stock pertaining to the Central Pacific railroad in the State of Nevada, and belonging to said Central Pacific Railroad Company, and known as rolling stock used on the said railroad in the State of Nevada, consisting of

the following, to wit: 52 locomotives and tenders, 20 first-class passenger cars, 10 sleeping cars, 15 caboose cars, 12 express, mail and baggage cars, 400 freight cars, 300 open or platform cars, 150 hand cars.

Also office furniture and fixtures of a movable nature, machines and machinery of a moveable nature, wood, coal and other supplies, materials, tools, trucks and scales, in said county.

Also 2.37 miles of side track of said railroad, in said county.

The said property being the same described in the assessment-roll of said county for the fiscal year 1888—defendants.

The State of Nevada, by W. D. Jones, district or prosecuting attorney of the county of Lander, State of Nevada, complains of the said defendants, Central Pacific Railroad Company, and the property, real estate and improvements described, and for cause of action says:

23 That in pursuance of the revenue laws of the State of Nevada, the board of county commissioners of Lander county, on the 2d day of January, 1888, did duly levy upon all the taxable property within the county of Lander a tax of $3.80 upon each $100 value of the property within the county.

That between the said 2d day of January, 1888, and the first Monday of September, 1888, in the county of Lander, in the State of Nevada, Jefferson Hull, then and there being county assessor of said county, did duly assess and put down on an assessment-roll all the real estate and personal property in said county subject to taxation, and that said assessment-roll was afterwards submitted to the board of equalization of said county, and was by said board duly equalized.

That said Central Pacific Railroad Company was then and there the owner of, and that there was duly assessed to it, the above-described real estate, improvements upon real estate and certain personal property, and that upon said property there has been duly levied for the fiscal year 1888 a State tax of $5,545.92 and a county tax of $17,870.19, amounting in the whole to $23,416.10, all of which is due and unpaid, of which amount $21,416.01 was duly assessed and levied against the real estate and $266 against

24 the improvements aforesaid, and $1,838.09 against the personal property.

That the above-described real estate, improvements and personal property is the same described in said assessment-roll and assessed as aforesaid.

That the said Central Pacific Railroad Company was during the time aforesaid, and for a long time prior thereto, had been, and now is, a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the city and county of San Francisco, State of California.

Wherefore said plaintiff prays judgment against the said Central Pacific Railroad Company for the sum of $23,416.10, the whole of said tax, and separate judgment against said real estate and improvements for the sum of $23,416.10, the tax due on said real estate, improvements and personal property, and $2,341.61, the ten

per cent. damages for the non-payment thereof, at the time as required by law, and the sum of $5,854.20, the additional penalty of twenty-five per cent. as provided by law, and the five per cent. on $31,611.73, the whole amount due for district attorney's fees, and an additional sum of $5 for district attorney's fees, amounting in all for district attorney's fees to the sum of $1,585.58, and
25 amounting in all in taxes, ten per cent. damages, twenty-five per cent. penalty, and the district attorney's fees aforesaid, to the sum of $33,197.31, and for such other judgment as to justice belongs, and for all costs subsequent to the assessment of said taxes and of this action, including the district attorney's fees, and all other fees allowed by law.

W. D. JONES,
District or Prosecuting Attorney in and for the County of Lander.
HENRY MAYENBAUM,
Of Counsel.

Indorsed: No. 1876. The State of Nevada *vs.* Central Pacific Railroad Company *et als.*, defendants. Amended complaint. Filed January 3d, 1891. J. A. Miller, clerk.

That thereafter, defendant, Central Pacific Railroad Company, filed its answer to said amended complaint, the same being as follows, to wit:

Answer.

In the District Court of the State of Nevada, Lander County.

THE STATE OF NEVADA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY and the Lands Described in the Complaint. } (Action No. 1876.)

Now comes the defendant, The Central Pacific Railroad
26 Company and for its answer to the amended complaint, filed herein by the plaintiff, denies and alleges as follows, to wit:

Denies—That the State and county taxes levied and assessed, in said county, for the year 1888 against 28.39 miles of railroad owned by the defendant in Lander county, including rails, couplings, spikes, ties, bridges, culverts, cuts, fills, embankments and the lands owned as the right of way of said company, in said county have not been paid, but in this behalf alleges that prior to the 20th day of November, 1888, and before the date when such taxes became delinquent for said year, this defendant tendered to, and offered to G. H. W. Crockett, the then county treasurer of said county of Lander, who was then and there the tax-collector and proper person to collect and receive from this defendant the State and county taxes levied against it for said fiscal year, all of the State and county taxes levied against it for said year 1888, upon said 28.39 miles of railroad, couplings, spikes, ties, rails, bridges, culverts, cuts, fills,

embankments and land owned by the right of way, but to receive said tax, or any part thereof, the said G. H. W. Crockett then and there refused.

Denies that it has situated in said county of Lander, in addition to said 28.39 miles of main track, $\frac{76}{100}$ of a mile of railroad, or any other or greater number of miles than 28 and $\frac{39}{100}$ miles, upon which it offered to pay as aforesaid, and alleges that the said $\frac{76}{100}$ miles of said road mentioned and described in the complaint for which said additional tax is claimed by the plaintiff, is situated in disputed territory between the county of Lander and the county of Eureka, and claimed by each of said counties, and was assessed in said county, and the defendant paid the tax thereon for the fiscal year 1888 to the county of Eureka, by virtue of said assessment.

27

Denies that it has situated in the county of Lander, between the eastern and western boundary thereof, 29 and $\frac{15}{100}$ miles of telegraph line, or any other or greater number than 28.39 miles of telegraph line; and

Denies that the tax upon said telegraph line for the fiscal year 1888 has not been paid, but in this behalf alleges: That prior to the 20th day of November, 1888, and before the taxes levied against said telegraph line became delinquent, the defendant tendered to, and offered to pay to G. H. W. Crockett, the county treasurer of said county of Lander, all the State and county taxes assessed against said 28 and $\frac{39}{100}$ miles of telegraph line, as aforesaid, but to receive the same, or any part thereof, the said Crockett as such county treasurer aforesaid, then and there refused.

28

Defendant further alleges: That the $\frac{76}{100}$ miles of telegraph line, in addition to said 28 and $\frac{39}{100}$ miles, upon which the defendant offered to pay, and which is demanded in plaintiff's complaint, is situated upon disputed territory, between the county of Eureka and the county of Lander, and said disputed territory was, and is, claimed by each of said counties, and was assessed in said Eureka county, and this defendant paid the taxes upon said $\frac{76}{100}$ miles of telegraph line for the year 1888 to the county of Eureka, by virtue of said assessment.

Denies that the State and county taxes levied and assessed against this defendant for the fiscal year 1888 upon all the structures and improvements owned by the defendant in the said county of Lander, consisting of depot at Battle Mountain, water tank, pumping engine, cattle corrals, and all other improvements assessed against it in said county at Battle Mountain, Argenta, or elsewhere in said county, for said year have not been paid, but in this behalf alleges: That prior to the 20th day of November, 1888, and before the taxes levied and assessed against it for said year upon said improvements mentioned and described in said complaint became delinquent, the defendant tendered to, and offered to pay to G. H. W. Crockett, the county treasurer of said Lander county, being the person lawfully entitled to take and receive the same, all of the taxes, both State and county, assessed and levied against said improvements for said year, 1888, but to accept or re-

29

ceive the same the said G. H. W. Crockett, county treasurer as aforesaid, then and there refused.

Denies that the State and county taxes for the fiscal year 1888, assessed and levied against the proportion of the rolling stock of the defendant, claimed by Lander county and described in plaintiff's complaint, has not been paid, but in this behalf, alleges: That prior to the 20th day of November, 1888, and before the taxes of said year became delinquent, the defendant tendered and offered to pay to G. H. W. Crockett, the county treasurer of said county of Lander, and the proper person to take and receive the same, all of the taxes, both county and State, which were assessed and levied against the rolling stock of the defendant in said county for said fiscal year 1888, but to take or receive the same, the said Crockett, as such county treasurer, then and there refused.

30 Denies that the State and county taxes for the year 1888, assessed and levied against the office furniture and fixtures, of a moveable nature, machines and machinery, supplies, materials, tools, trucks and scales as described in said complaint, and situated in said county, have not been paid, but in this behalf, alleges: That prior to the 20th day of November, 1888, and before the State and county taxes for said year became delinquent, the defendant tendered to, and offered to pay to G. H. W. Crockett, the county treasurer of said county, all of the State and county taxes levied and assessed against said property for said year, but to take and receive the same the said Crockett, as such county treasurer, then and there refused.

Defendant denies that the State and county taxes for the year 1888, assessed and levied in said county against 2 and $\frac{37}{100}$ miles of side track, mentioned and described in the complaint, have not been paid, but in this behalf alleges: That prior to the 20th day of November, 1888, and before the taxes for said year became delinquent, the defendant tendered to, and offered to pay to G. H. W. Crockett, the county treasurer of said county, all of the State and county taxes assessed and levied against said 2 and $\frac{37}{100}$ miles of side track, for said fiscal year, but to take and receive the same the said Crockett, as such county treasurer, then and there refused.

31 Defendant further alleges: That there was assessed against the defendant for the year 1888, in the county of Lander, State of Nevada, for State and county purposes, taxes upon 28 and $\frac{39}{100}$ miles of railroad, track, road-bed, iron, ties, spikes, rails, cuts, fills, right of way, improvements, side tracks, switches, $28\frac{39}{100}$ miles of telegraph line, depot building, office furniture, moveable machinery, water tanks, pipes, pumping engines and rolling stock, consisting of cars, engines, hand cars and every other character of rolling stock and property, including wood, coal, and every description of property described in the complaint, except the lands therein described, $15,645.66.

That after said assessing season was over and the assessment-roll for said county was completed and equalized by the board of county commissioners of said Lander county as above mentioned and de-

scribed, upon all the lands belonging to this defendant, which included all the property owned, claimed or possessed by it, either real or personal, in said county, save and except the lands mentioned and described in the complaint, the amount of taxes levied and assessed against it was the sum of $15,645.66, and prior to the said 20th day of November, 1888, and before the time had
32 expired for the payment of taxes, as provided by law, without any additional percentage or penalty for delinquency, and before the same became delinquent, this defendant tendered to and offered to pay to G. H. W. Crockett, the county treasurer of said county, in payment of the taxes so levied and assessed against it, upon the property above described, all of the State and county taxes assessed and levied against it for said fiscal year, to wit: the said sum of $15,645.66, but to take or receive the same the said Crockett, as treasurer of said county, then and there refused.

That in said tender and offer of payment, defendant included every piece of property owned or claimed by it in said county, or to which either in law or equity it has any right, title, interest or claim, save and except the lands in said complaint, mentioned and hereinafter referred to; that said county treasurer aforesaid refused to accept or receive the money for said taxes thus offered and tendered by said defendant, or any part thereof, and after the time had expired for receiving the same by him, without additional penalties for delinquency, he placed said taxes and the whole thereof upon the delinquent tax-roll of said county, for said fiscal year 1888, and said delinquent roll subsequently was returned to the district attorney of said county, who thereafter,
33 upon the 31st day of December, 1888, commenced this action to recover said taxes, penalties and costs; that thereafter upon the 25th day of January, 1889, and after the commencement of said action, the district attorney of said county, and the attorney for the plaintiff therein, notified this defendant in writing of his willingness to accept the taxes tendered as aforesaid upon all the property above described, save and except upon the lands in said complaint, particularly mentioned and described, and demanded from this defendant the payment thereof, and in accordance with said notice and demand, this defendant paid the same, to wit: the sum of $15,645.66 and the said plaintiff through its attorney, accepted the said amount and ever since has, and still does retain the same as part and parcel of the revenues of said county, and said sum was paid by this defendant, and received by said plaintiff in full satisfaction of all the taxes levied and assessed against said defendant upon the property above described, for the fiscal year 1888.

Denies that Jefferson Hull, the county assessor of Lander county, State of Nevada, for the year 1888, or any other person as assessor of, or in behalf of said county for said year, assessed to this defendant 354,536 acres of land or any part or portion thereof, but
34 in his behalf alleges: That said assessor assessed to this defendant a possessory claim of 354,536 acres of land. But this defendant denies, that at the time mentioned in complaint, or

at any other time or at all, it ever had, owned, claimed, or possessed any "possessory claim" to said lands, or to any part or portion thereof, that it ever had or now has any "possessory interest" of, in, or to any of the lands described in the complaint, or the possession of the same, or any part thereof, and the only right or interest of this defendant, to any of said lands, save and except 24,136 acres thereof, is that derived by virtue of the acts of Congress, granting lands in aid of the construction of a railroad from the Missouri river to the Pacific ocean, approved July 1st, 1862, and July 2d, 1864, and denies that its said right or interest to said lands if any it has under said acts of Congress, was ever assessed to it by said assessor in Lander county, Nevada, for said year 1888.

Denies: That the *acres* of the grant of land by the Government of the United States to this defendant in said county of Lander, comprises or includes 354,536 acres, or any other or greater number, so far as the same has been ascertained by the public surveyor of the United States, than 151,197 acres, and that the remaining portion of said grant in said county, was in said year 1888, unsurveyed and unsegregated from the public domain, and had never been by any officer of the United States, either surveyed, segg*r*egated, set apart to, or shown to be, a part or parcel of the lands granted to this defendant under said acts of Congress, and is not included in any levy of taxes made by the county commissioners of Lander county, for the year 1888, or subject to assessment against this defendant therein.

Denies: That it had situated in Lander county for the year 1888, and subject to assessment therein, any other or greater number than 148,077 acres, and denies that any interest which it had or possessed in said lands was ever assessed to it for said year 1888 by the assessor of said county of Lander, or that it was placed upon the assessment-roll of said county for said year.

Denies: That it claims any title, interest or other right, to any of the surveyed lands described in the complaint, save and except to 148,077 acres thereof, and its only interest in those lands is that derived by the grants aforesaid, and that said interest, if any, was not assessed to it by said assessor of said county of Lander for the year 1888. Defendant in this behalf, further alleges that of the lands attempted to be described in said amended complaint, and being those embraced within the limits of the grant to the Pacific railroads under said acts of Congress, there are and will be, if the same shall ever be surveyed by the Government of the United States, within the said county of Lander, at least and not less than 186,217 acres of land, which are now wholly unsurveyed, and that as to such lands the section lines have not been run, nor established, nor have the odd-numbered sections ever been segregated from the even-numbered sections, nor have the same, or any part thereof, *ever been segregated from the even-numbered sections, nor have the same, or any part thereof,* ever been segregated from the body of the public lands of the Government of the United States, and it is now impossible to ascertain or determine where said odd-num-

bered sections will be located or established when the same shall have been surveyed.

Defendant denies that the area of the land grant made to this defendant by the Government of the United States, under the acts of Congress aforesaid, in said county of Lander, State of Nevada, amounts to, or comprises 354,536 acres, or any other or greater number than 337,637 acres, and in this behalf alleges that of said acreage last above mentioned there have only been surveyed by the Government of the United States 154,197 acres.

37 Defendant, further answering said amended complaint, denies: That it was at the time the assessment mentioned in said amended complaint was made, or at any time during the year 1888, or at any time since, the owner of the following-described lands, or that it was at any of said dates the owner of any claim, title or interest in any of said lands, or that it had and claimed, owned or asserted any possession, possessory claim or possessory interest of, in, or to any of said lands, the same being a part and portion of those described in said complaint and being described as follows, to wit: The east ½ of east ½ of section 29, township 34 north, range 44 east; south ½ of section 33, township 33 north, range 44 east; southeast ¼ of section 25, township 34 north, range 47 east; southeast ¼ of section 35, township 34 north, range 47 east; west ½ of sections 7, 19, 31, township 33 north, range 48 east; west ½ of section 31, township 34 north, range 48 east; south ½ of section 13, township 36 north, range 45 east, and southeast ¼ of section 36, township 32 north, range 44 east, comprising 2,560 acres.

Defendant further answering said amended complaint, alleges that the following-described lands, being a part and portion of the lands described in the complaint are not within the limits of

38 the grant to the defendant, and do not comprise any portion of the lands granted to the defendant by the Government of the United States, by said acts of Congress, and therefore defendant denies that it is, or that it ever was, the owner, or that it ever had any interest, right, title, claim or possession, in or to said lands, the same being described as follows, to wit: The southwest ¼ of section 1, township 28 north, range 45 east; lots 1 and 2, in southeast ¼ of section 1, township 28 north, range 46 east; east ½ of the west ½ of section 19, township 36 north, range 48 east; east ½ of the west ½ of section 31, township 36 north, range 48 east.

Defendant further alleges that the said Jefferson Hull, as assessor of Lander county as aforesaid, in making up and entering the assessment of said lands to this defendant for the year 1888, assessed and placed them upon the assessment-roll in the following manner, to wit: "Possessory claim to the following-described tracts, pieces and parcels of land, in the enumeration of which lands unsurveyed are described as their designation will appear when the surveys of the United States are extended over them, and all lands surveyed are described as shown by the map of surveys furnished to the assessor of Lander county by the surveyor general and *ex officio* land register of the State of Nevada, as provided by

39 law. Said lands being lands in Lander county, Nevada,

granted to the Central Pacific Railroad Company by the United States, by act of Congress of July 1st, 1862, as amended by act of Congress of July 2d, 1864." That said assessor accompanied said assessment by a congressional description of three hundred and fifty-three thousand seven hundred and forty-nine (353,749) acres of land, but neither assessment-roll nor the amended complaint in this action separates the surveyed lands from those which are unsurveyed, or those which might be taxed from those which are exempt from taxation, and the whole of said lands are assessed as a unit, and a joint or aggregate levy of taxes for said year 1888 was made upon all the property mentioned and described in the amended complaint herein, embracing and including said unsurveyed lands. Defendant further alleges that said assessment and the whole thereof is invalid and void; that no valuation was ever made by said assessor of the lands of this defendant situated in said county, and subject to taxation therein, separate and apart from those lands which are unsurveyed and not subject to taxation, and therefore defendant denies that said assessor assessed any lands or any title, interest, claim or possession therein or thereto, to, or against
40 this defendant, for said year 1888. Defendant further denies that there was duly or otherwise levied upon the property of defendant in said county for said year 1888 a State tax of $5,545.92, or any other sum whatever, or a county tax of $17,870.19, or any other sum whatever, or an aggregate sum of $23,416.10, or any other sum whatever, but in this behalf alleges by way of explanation that said levy was made, as stated in said complaint, as a unit and included, and was based upon certain property owned by and assessable to this defendant, and also upon 186,217 acres of unsurveyed lands, and that therefore said assessment and the whole thereof, is null and void.

Wherefore the defendant, having fully answered, asks to be hence dismissed with the costs of suit.

BAKER & WINES,
Attorneys for Defendant.

STATE OF NEVADA, } ss:
County of Washoe, }

J. L. Wines, being first duly sworn, deposes and says that he is the agent and one of the attorneys of the said defendant, The Central Pacific Railroad, in the State of Nevada. That he has read the foregoing answer and knows the contents thereof, and the
41 same and the statements herein contained are true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

J. L. WINES.

[SEAL.] C. D. VAN DUZER,
Notary Public in and for the County of Washoe.

That the defendant and appellant herein, thereafter, by leave of court, filed its verified amendment to its said answer, wherein it was alleged that the costs of surveying, selecting and patenting

one hundred twenty-two thousand eight hundred twenty-four (122,824) acres of land, being a portion of the land described in said amended complaint, had never been paid, neither by the defendant in said action, the appellant herein, nor by any person for, or in its behalf, and that the same were due and unpaid.

In the District Court of the State of Nevada in and for the County of Lander.

THE STATE OF NEVADA, Plaintiff and Respondent,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant and Appellant. } No. 1876.

42 *Statement on Motion for a New Trial.*

Be it remembered that the above cause came regularly on for trial before the court, a jury having been waived, upon the 29th day of July, 1891. The parties to said action consented to and caused to be filed upon said day, a written statement of facts, and then agreed in open court that said cause was submitted to the court upon said agreed statement of facts, and not otherwise. That said statement contained the following statement of facts in addition to other facts which are not pertinent or material upon the hearing of this application, to wit:

In the District Court of the State of Nevada in and for the County of Lander.

THE STATE OF NEVADA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } (Action No. 1876. For Taxes of 1888.)

It is hereby stipulated and agreed that of the land described in the amended complaint on file herein, 131,386 acres are surveyed but unpatented, and the same were assessed for the year 1888 at fifty cents per acre by the assessor of said county.

That the patented lands embraced in said complaint
43 amounted to 24,123 acres, and the same were assessed at $1.25 per acre for the said year by said assessor.

That of the lands described in said complaint 195,200 acres are unsurveyed, 2,080 acres were sold and conveyed by defendant, and 960 were beyond the limits of the grants to said defendant and were not its property, and the said lands were assessed for said year by said assessor at fifty cents per acre.

That the tax levy for said year was $3.80 on each $100.

That the costs of surveying, selecting and conveying 122,824 acres of said surveyed unpatented lands above mentioned have not been paid.

That said defendant has heretofore mortgaged said lands described in said complaint, and has at divers times leased various portions thereof.

"That said defendant has never had any other possession of any part of said lands than such as may be inferred from executing said mortgages and leases and by virtue of the land grants to it of 1862 and 1864." End of stipulation.

That said statement so agreed upon contained and embraced other facts tending to show a tender of all the taxes due the plaintiff from appellant upon all its other property then upon the assessment-roll in Lander county, save and except the lands de-
44 scribed in said amended complaint, prior to the time when the statutory penalties could attach and the subsequent payment and acceptance of such tax upon demand of the district attorney of said Lander county, but such other facts are not material or necessary to the determination of the question presented upon this application for a new trial, and are therefore omitted.

That thereafter the court having taken said cause under advisement for its determination upon the pleadings and said agreed statement of facts, to wit: upon the 25th day of February, 1892, caused to be filed in said cause its decision and order for judgment, the same being as follows, to wit:

In the District Court of the State of Nevada in and for the County of Lander.

THE STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, a Corporation, and The Property Described in the Complaint, Defendant.
(Action No. 1876. For Taxes 1888.)

Decision.

In view of the decisions of this and other States, and of the Supreme Court of the United States, the law seems to be settled
45 that the claim of the defendant to the lands granted by the acts of Congress is taxable as to surveyed lands and not taxable as to lands unsurveyed. Without doubt, — the defendant had the possessory interest on the public domain it would be subject to taxation the same as that of any other claimant, but it has no actual possession of the lands, no constructive possession, except such as may be presumed from the fact of the grant, and no claim except the one under the acts of Congress. As to the unsurveyed lands, this latter, under the decisions, is clearly not taxable, and any possession following it is an inference or presumption only and would be a part of this claim, inseparable from it, and would properly come under the same rule. If the defendant should fence, improve and occupy, or use, the unsurveyed lands, it would thereby acquire an interest which ought to be taxed like the claim of any settler on the public domain. From a fair construction of the language of the stipulation it appears that the defendant had no interest in the unsurveyed land except the one which it claims under the grant, and which is not taxable. It has been urged on behalf

of the State that it is not shown, and that it is incumbent on the defendant to show, that it had no claim, title or interest to these lands except that arising from the grant. The last clause of
46 the stipulation submits the cases on the facts stated, and would seem to withdraw from the consideration of the court any other facts not following as a presumption. If defendant had had a possessory interest in the unsurveyed lands that was taxable the description was not sufficient. These lands are described in the complaint only by the surveys which do not exist and have never been made, as is shown by the stipulation, and hence there is nothing to identify them. As all the lands in the complaint are designated by surveys, those that are actually within the surveys are sufficiently described.

True, the stipulation does not specify the particular subdivisions that are surveyed, but the aggregate number of acres in each class is determined, and the valuation is the same on all unpatented lands, so that the amount of the tax can be determined on all the classes that are properly taxable, and for the purposes of a judgment *in personam* it is unnecessary to determine the particular subdivisions by surveys in any class. The amount of the judgment against the defendant would be the same any way. As to the surveyed lands, the description is good, and the clause in the stipulation that they were taxed means, and it is presumed, that they were properly assessed. The authorities cited by the coun-
47 sel for the State appear conclusive that the claim set up that the defendant is not liable because it is taxed for a possessory claim instead of its title, is not a defense which it is permitted to make under the statute. Relative to the question of tender it is not shown, and there is no allegation that the defendant kept the tender good, except that it is alleged and shown that the money was paid to the district attorney on demand. In this regard the allegations in the amended answer are the same as those in the original answer, which the supreme court in this case held sufficient to raise the question of tender, and I conclude that the stipulated facts support these allegations, and, therefore, the pleading having been held to be good, the facts must be sufficient. The plaintiff, having failed to demur to the answer or make any objection on the trial in time for the defendant to amend and prove that it kept its tender good, that objection is likely waived. See Halpin *vs.* Insurance Company, hereinafter cited. On November 16th, 1888, defendant tendered to Crockett, who was county treasurer and express agent, $15,645.66, which was the whole amount due as taxes upon all of defendant's property, excepting lands, as the same appeared upon the assessment-roll. With the money, and to be executed as a condi-
48 tion of its payment, was a voucher attached to a description of all the property, except the lands, which read: "Received from the S. P. Co. $15,645.66 in full for the above account." The natural meaning of the words in this receipt is that it was to be in full for the amount of taxes against the pieces of property enumerated in the description attached, and "in full for the above account" could not properly be construed to mean in full for property not

mentioned in the voucher. Another commission and voucher, with another amount of money to be tendered on the lands, also showed that the $15,645.66 was confined to the other property, but if Crockett was still in doubt, the telegram ought to have made the matter clear to him. It was received at Austin, 3 p. m., on November 19th. No penalty could attach until 6 that evening. It referred to commission 962, which was one enumerating all the property except lands, and it directed that the money be counted out to the tax-receiver as payment in full of State and county taxes on the property described. It is clear that there was a tender of the whole amount assessed or that could be claimed on all the property, except the lands. It was at first conditioned that the voucher presented in full for that property be executed, and later by the telegram, that the money be received in full on that property,
49 which would have authorized the acceptance of the money on the issuance of the treasurer's regular receipt in full for the property described. Did the condition defeat the tender? It is a general rule that a tender must be unconditional. There is much authority, especially among the earlier decisions, that the demand of a release, discharge, or a receipt, would vitiate the tender, and even that a mortgagee, upon payment of the debt, could not demand a surrender of the mortgage and a cancellation on the record as a condition, but to compel a discharge would be forced to an action after payment. Richardson *vs.* Boston Lab., 9 Met., 51; Loring *vs.* Cook, Wood *vs.* Hitchcock, 20 Wendell, 47, cited by plaintiff. Also Halton *vs.* Brown, 18 Vt., 224; Brown *vs.* Gilmore, 8 General, 107. But the rule has its exceptions. It has been modified in Massachusetts, and has been overruled or modified in New York. In Saunders *vs.* Frost, 5 Pick., 270, it is said: "It would seem that a demand of a release accompanying the tender is proper, for it is the demand of the performance of a duty imposed upon the mortgagee by statute." In Myers *vs.* Wycoff, 114 N. Y., 04, the tender seems to have been made on a condition that the party had no right to exact.
In Rialey *vs.* Buchannan Co., 115 N. Y., 297, it was held
50 "that the party had the right to tender payment of the entire debt and to demand the surrender of all the securities by which it is evidenced." And that such tender was sufficient and stopped the running of interest. In Halpin *vs.* Phœnix Ins. Co., 118 N. Y., 165, 20 N. E. Rep., 482, a number of older cases are reviewed and classified, and part of them are apparently overruled or modified. It is there held that where there is no dispute as to the amount of the debt a tender may always be restricted by such conditions as by the terms of the contract are conditions precedent as simultaneous to the payment of the debt, are proper to be performed by the party to whom the tender is made, this appears to be more reasonable, more liberal and more just rule.

Our own supreme court, in State *vs.* Carson Savings Bank, said: "The tender was made on a condition that it should be received in full satisfaction."

If defendant's theory of the law had been found correct, the tender would have been found sufficient. But the law being other-

wise, the tender of a part, made on condition that it be received for the whole, does not relieve the defendant from the payment of the entire penalties. To make a tender valid, it must be so made
51 that the party refusing it is in the wrong. Crockett undoubtedly acted in good faith. He likely thought the defendant had no right to pay the taxes on part of its property and not on all, but the defendant did have that right, and he was legally in error in refusing to accept a tender of all the taxes due or assessed on all the property, except the lands, and as the statute provides that upon the payment of the tax the treasurer shall give a receipt with a description of the property, the demanding of a receipt was a condition within the treasurer's duty, and one which the defendant had a right to exact. See Johnson *vs.* Cramage, 45 Mich., 14.

There is another rule which sustains the validity of the tender conditioned by a demand of a receipt. In his opinion, on the appeal in this case, Judge Bigelow said: "Where a public officer has been clothed by statute with power to do an act which concerns the rights of third persons, the execution of the power may be insisted on, though the phraseology of the statute be permissive merely and not peremptory." In elaborate briefs counsel have ably presented each side of the questions involved and have simplified the labor of the court.

I conclude that the plaintiff is entitled to recover of the defendant, The Central Pacific Railroad Company, the taxes for the year
52 1888, at the rate of $3.80 on each $100 valuation, on 24,123 acres of patented lands, assessed at $1.25 per acre, amounting in taxes to $1,145 84
And on 131,386 acres surveyed but unpatented lands, assessed at fifty cents per acre, amounting in taxes to... 2,496 33

Making the total tax due $3,642 17
And for ten per cent. thereon for delinquency 364 21
And for twenty-five per cent. as liquidated damages 910 54

Total $4,916 92

And for costs of suit, including $250.85, district attorney's fees, being $5, and five per cent. of the amount delinquent.

Let judgment be entered accordingly.

G. F. TALBOT,
District Judge.

Statement on Motion for New Trial Continued.

That thereafter, and in pursuance of said decision, a judgment was regularly entered in said court, as follows, to wit:

For the sum of $3,642.17, together with ten per cent. thereon for delinquency, amounting to $364.21; also, twenty-five per cent. as liquidated damages, amounting to $910.54; also district attorney's fees amounting to $250.85, together with the ordinary costs of suit, taxed at $770.04.

53 The said defendant, Central Pacific Railroad Company, as appellant, feeling itself aggrieved by said decision and judgment, and desiring to apply for a new trial in said cause, now submits its assignments and specifications of error, and alleges wherein said evidence as contained in said agreed statement of facts is insufficient to justify or sustain said decision and judgment, or either of them, and wherein the same are, and each of them is, against law, to wit: The said decision and judgment thereon show that said judgment was ordered, rendered and entered for the taxes claimed to be due upon 24,123 acres of patented land at an assessed valuation of $1.25 per acre, and also upon 131,386 acres of surveyed but unpatented lands at an assessed valuation of fifty cents per acre, while the evidence, as contained in said agreed statement of facts, shows that said 131,386 acres of surveyed, unpatented land contained, embraced, and were made up in part of 122,824 acres of land, upon which the costs due the Government of the United States for the surveying, selecting and patenting of the same have never been paid.

That the evidence, as contained in said agreed statement of facts, also shows that the defendant and appellant is still indebted to the Government of the United States for the costs of surveying,
54 selecting and conveying said 122,824 acres of lands; also, the evidence as contained in said agreed statement of facts shows that neither said decision nor judgment are justified or supported by such evidence in this: That it does show that said judgment ought not to have been rendered for more than the tax due upon said 24,123 acres at said valuation of $1.25 per acre, and upon 8,562 acres, being the difference between 131,386 acres and 122,824 acres at said valuation of fifty cents per acre, with the statutory penalties provided by law; also for the further reason that the evidence, as contained in said agreed statement of facts shows that the only tax due from appellant or for which it is liable in this action is the amount due upon said 24,123 acres, and said 8,562 acres, together with the statutory penalty thereon.

That said decision and judgment are each against law, and the evidence, as contained in said agreed statement of facts, and such evidence is insufficient to justify or sustain the same, or either of them, in this: That appellant was and is not liable for the taxes claimed upon the said 122,824 acres of land, for the reason that the Government of the United States has never been paid the costs of surveying, selecting nor conveying the same, and the same
55 still remains unpaid, and for the further reason that the State of Nevada has never, by its proper legislative department, accepted the terms nor conditions contained in that certain act of Congress, entitled "An act to provide for taxation of railroad grant lands and for other purposes," approved July 10, 1886.

That said decision and judgment are each against law, in this: That the State of Nevada has never, by its proper legislative department, provided by appropriate legislation for the protection and security of the lien of the United States for the costs of surveying,

selecting and patenting said 122,824 acres of land under the provisions of said act of Congress.

That said evidence, as contained in said agreed statement of facts, is insufficient to, and does not justify or sustain said decision or judgment, nor either of them, in this: That the evidence fails to show that the costs of surveying, selecting and conveying said 122,824 acres of land have been paid, or that the lien of the Government of the United States for the same has ever been waived, or that the State of Nevada has ever accepted said act of Congress, or provided for the protection of such lien of the Government of the United States, as required by said act of Congress.

Upon the above specifications, showing wherein the evi-
56 dence is insufficient to justify or support the decision or judgment of the court herein, appellant respectfully asks for a new trial in said cause.

Respectfully submitted,

BAKER, WINES & DORSEY,
Attorneys for Appellant.

Service of within statement on motion for new trial accepted after filing this 3d day of March, 1892.

JAS. B. EGAN,
As District Attorney, Lander County, Nevada.

STATE OF NEVADA, }
County of Lander. }

I, J. A. Miller, clerk of the district court of the State of Nevada, in and for Lander county, certify that no amendments to the foregoing statement have been filed.

March 9, 1892.

J. A. MILLER, *Clerk.*

Indorsed: No. 1876. In the supreme court of the State of Nevada. The State of Nevada, plaintiff and respondent, *vs.* Central Pacific Railroad Company, defendant and appellant. Proposed statement on motion for new trial. Filed March 3, 1892. J. A. Miller, clerk. Baker, Wines & Dorsey, attorneys for appellant.

57 *Notice of Motion for a New Trial.*

In the District Court of the State of Nevada in and for the County of Lander.

THE STATE OF NEVADA, Plaintiff and Respondent,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant and Appellant. } (No. 1876.)

To James B. Egan, as district attorney of Lander county, State of Nevada, and Henry Mayenbaum, attorneys for the plaintiff and respondent above named, and to the said plaintiff:

You, and each of you, will take notice that the defendant and appellant above named will apply to, and move the court herein

for an order setting aside and vacating the decision and judgment of the court in the above-entitled cause rendered and entered in said cause. And for an order granting a new trial to said defendant and appellant upon the grounds and for the reasons, to wit: insufficiency of the evidence and admitted statement of facts to justify or sustain the decision and judgment of the court herein. And that the same are, and each of them is, against law. That the stipulated facts in the above cause constituting the findings therein, do not support nor justify the decision, nor the judgment of the court herein. That this application will be made upon a
58 statement to be hereafter filed and served, said decision having been filed herein upon the 25th day of February, 1892.

Dated this 3d day of March, 1892.

BAKER, WINES & DORSEY,
Attorneys for Appellant.

Service by copy after filing admitted this 3d day of March, 1892.

JAS. B. EGAN,
As District Attorney, Lander County, Nevada.

Indorsed: No. 1876. State of Nevada *vs.* Central Pacific Railroad Company. Notice of motion for new trial. Filed March 3, 1892. J. A. Miller, clerk.

Order Overruling Motion for New Trial.

In the District Court of the State of Nevada in and for the County of Lander.

THE STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY AND THE PROPERTY DESCRIBED IN THE COMPLAINT, Defendant.

(Action No. 1876. Taxes for 1888.)

Order.

For the reasons stated in the decision defendant's motion for a new trial in the above-entitled case is denied, and defendant excepts.

G. F. TALBOT,
District Judge.

59 Indorsed: No. 1876. Taxes for 1888. District court, Lander county. State *vs.* C. P. R. R. Co. *et als.* Order denying defendant's motion for new trial. Filed March 12, 1892. J. A. Miller, clerk.

Notice of Appeal.

In the District Court of the State of Nevada in and for the County of Lander.

THE STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } (No. 1876.)

To James B. Egan, as district attorney of Lander county, State of Nevada, and Henry Mayenbaum, attorney for plaintiff, and to said plaintiff, and to the clerk of said court:

You will take notice that the defendant hereby appeals, and does appeal to the supreme court of the State of Nevada, from the judgment heretofore rendered and entered in said above-entitled action in favor of plaintiff and against the defendant for the sum of $4,916.92, and costs taxed at $953.39, upon the 25th day of February, 1892, and also from the order denying and overruling
60 the motion and application of said defendant above named for a new trial in said action made and entered in said cause upon the 12th day of March, 1892, and from the whole of said judgment and order and from each thereof. This appeal is taken, both upon questions of law and fact.

BAKER, WINES & DORSEY,
Attorneys for Defendant.

Service of within notice of appeal accepted after filing by copy this 22d day of March, 1892.

JAS. B. EGAN,
As District Attorney, Lander County, Nevada.

Indorsed: No. 1876. In the district court of the State of Nevada, county of Lander. The State of Nevada *vs.* Central Pacific Railroad Company. Notice of appeal. Filed March 22, 1892. J. A. Miller, clerk. Baker, Wines & Dorsey, attorneys for defendant.

Undertaking on Appeal.

In the District Court of the State of Nevada in and for the County of Lander.

THE STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendants. } (No. 1876.)

61 Know all men by these presents that we, The Central Pacific Railroad Company, a corporation, as principal, and Leopold Steiner, (residence, Austin, Nevada; occupation, stock-raiser and rancher), and Samuel Crescenzo (residence, Austin, Nevada;

occupation, merchant), are held and firmly bound unto The State of Nevada, the plaintiff above named, in the sum of three hundred dollars ($300), for the true payment of which well and truly to be made, we jointly and severally and firmly bind ourselves, our heirs, executors, administrators and assigns.

Dated and sealed with our private seals this 22d day of March, 1892.

LEOPOLD STEINER.
SAMUEL CRESCENZO.

The condition and consideration of the above undertaking is such that, whereas, the said plaintiff did, upon the 25th day of February, 1892, obtain and recover a judgment against said defendant in the above-entitled court for the sum of $4,916.92, principal, judgment and costs, taxed at $953.39, with interest, as provided in said judgment; and, whereas, said defendant has given notice of an appeal to the supreme court of the State of Nevada, from said judgment, and the whole thereof, and from an order denying and overruling the application and motion of said defendant for a new trial
62 in said action and from the whole thereof, said order having been made and entered in said cause, upon the 12th day of March, 1892. Now, therefore, in consideration of the premises and such appeal, we, the said Leopold Steiner and Samuel Crescenzo, as such sureties, do hereby promise, agree and undertake, to and with said plaintiff, The State of Nevada, in the sum of three hundred dollars ($300), lawful money of the United States, that the said Central Pacific Railroad Company, a corporation, as such appellant, will pay all damages and costs which may be awarded against it on such appeal, not exceeding the said sum of three hundred dollars ($300), and in case of failure upon the part of said appellant to pay said sum, we, as such sureties, do jointly and severally acknowledge ourselves to be indebted unto the said State of Nevada to the amount and in the said sum of three hundred dollars ($300); and, whereas, the said Central Pacific Railroad Company, as such appellant, is desirous of obtaining and securing a stay of execution upon said judgment, and does hereby submit this undertaking under section 3364 of the General Statutes of the State of Nevada. Now, therefore, in consideration of the premises and of such appeal, and of such stay of execution upon said judgment, we, the said Central Pacific Railroad Company, as principal, and
63 Leopold Steiner and Samuel Crescenzo, as sureties, do hereby jointly, severally and firmly undertake, promise and agree, to and with the State of Nevada, in the penal sum of $12,350, being double the amount of said judgment and costs, that if the judgment or order appealed from, or any part thereof, be affirmed, the said appellant shall and will pay the amount directed to be paid by said judgment or order, or the part of such amount as to which said judgment or order shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against said appellant upon said appeal, in the lawful money of the United States. And in case of a failure upon the part of said appellant to pay the amount

directed by the judgment or order of the court, upon such appeal, we, the said Leopold Steiner and Samuel Crescenzo, do hereby jointly and severally acknowledge ourselves to owe, and to be indebted unto, the said State of Nevada, in the sum of twelve thousand, three hundred and fifty dollars ($12,350). That all the allegations and recitals contained in the foregoing undertaking for three hundred dollars ($300) are hereby expressly made a part of this undertaking in the last named sum of twelve thousand, three hundred and fifty dollars ($12,350).

64 Witness our hands and private seals this, the 22d day of March, 1892.

LEOPOLD STEINER.
SAMUEL CRESCENZO.

STATE OF NEVADA, } ss:
County of Lander, }

Leopold Steiner and Samuel Crescenzo, being each severally duly sworn for himself, and not one for the other, says: I am a resident and a freeholder residing in Lander county, Nevada. That I am one of the sureties executing the above undertaking. That I am worth the amount specified therein as the penalty thereof, to wit: the sum of $12,350 over and above my just debts and liabilities, in real and personal property, exclusive of that exempt from seizure or forced sale.

LEOPOLD STEINER.
SAMUEL CRESCENZO.

Subscribed and sworn to before me this 22d day of March, 1892.
[SEAL.] J. A. MILLER,
County Clerk.

Indorsed: No. 1876. In the district court of the State of Nevada, county of Lander. The State of Nevada *vs.* Central Pacific
65 Railroad Company. Undertaking on appeal. Filed March 22, 1892. J. A. Miller, clerk. Baker, Wines & Dorsey, attorneys for appellant.

Certificate of Clerk.

In the District Court of the State of Nevada in and for the County of Lander.

THE STATE OF NEVADA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } (No. 1876.)

I, J. A. Miller, county clerk of Lander county, State of Nevada, and *ex officio* clerk of the district court in and for the county of Lander, State of Nevada, do hereby certify the foregoing to be a full and true copy and transcript of "engrossed statement on appeal," consisting of the following papers and records, with the indorsements thereon, to wit:

Amended complaint, answer and amendment to answer, proposed statement on motion for new trial, notice of motion for new trial, order denying defendant's motion for new trial, notice of appeal, undertaking on appeal. The same being all the papers and
66 records pertaining to said appeal now on file and of record in my office.

[SEAL.] Witness my hand and the seal of said court this 28th day of March, 1892.

J. A. MILLER, *Clerk.*

Indorsed: No. 1876. The State of Nevada, plaintiff, *vs.* Central Pacific Railroad Company, defendant. Engrossed statement and record on appeal.

(Endorsed on cover:) No. 1356. Supreme court of the State of Nevada. The State of Nevad-, respondent, *vs.* The Central Pacific Railroad Company, appellant. Transcript on appeal. Baker, Wines & Dorsey, attorneys for appellant. Filed April 4, A. D. 1892. Joe Josephs, clerk.

67 *Order Submitting.*

In the Supreme Court of the State of Nevada.

CARSON CITY, *April* 4, 1892.

The court regularly met this the first day of the April term, A. D. 1892, and there were—

Present: Murphy, J., and Bigelow, J., and officers of the court.

* * * * * * *

THE STATE OF NEVADA, Respondent,
v.
THE CENTRAL PACIFIC RAILROAD COMPANY, Appellant. } No. 1356.

The above-named cause having been duly called from the calendar, when, upon motion of H. Mayenbaum, Esq., it was ordered by the court that * * * said cause be submitted on briefs as per stipulation on file. * * *

JOE JOSEPHS, *Clerk.*

68 *Stipulation.*

In the Supreme Court of the State of Nevada.

THE STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY *et als.*, Defendants.

There are three appeal cases of the above title numbered as State appeals 1353, 1354, 1355.

And there are three appeal cases of the above title and being appeals by the defendants of the same cases and numbered 1356, 1357, and 1358.

Now it is stipulated that the above-named appeals be all sub-

mitted together on briefs. * * * The State has already filed its brief. The defendants must file their briefs in said cases within thirty days from this date, and the State may within ten days thereafter file its reply to said defendants' brief. The transcript of defendants' appeal may omit the printing of the description of the property wherever it occurs. * * *

And it is further stipulated that no objection whatever shall be made by either party to any of the transcripts, but the said transcripts shall be deemed sufficient in every respect, including the certificates of the clerk thereto.

J. D. TORREYSON,
Attorney General.
HENRY MAYENBAUM,
For State in All Cases.
BAKER, WINES & DORSEY,
Attorneys for Defendants in All Cases.

Carson, April 4, 1892.

(Endorsed:) Filed April 4, 1892. Joe Josephs, clerk supreme court, Nevada.

69 *Syllabus of the Opinion.*

In Supreme Court, State of Nevada.

THE STATE OF NEVADA, Respondent,
v.
THE CENTRAL PACIFIC RAILROAD COMPANY, Appellant. } No. 1356.

THE STATE OF NEVADA, Appellant,
v.
THE CENTRAL PACIFIC RAILROAD COMPANY, Respondent. } No. 1353.

Syllabus by the judge.

1. Since the act of Congress of July 10, 1886, the surveyed but unpatented lands within the grant to the Central Pacific railroad are no longer exempt from taxation by reason of the Government *line* thereon for the costs of surveying, etc. The conditions contained in that act to the effect that the lien shall continue, and that the United States may become a preferred purchaser at any tax sale of such land, control such sales, and there is no necessity for a legislative acceptance by the States of the conditions of the act.

2. Congress having full control over the public domain may make it subject to State taxation upon such conditions as are deemed proper, and then, if so taxed, it must be done subject to those conditions.

3. The act of July 10, 1886, is a grant to the States of a right to tax lands in which the United States still has such an interest as renders them exempt, and being beneficial, its acceptance by the grantees will be presumed.

4. The title or interest of the United States in the public lands will not be affected where only the possessory claim to the land is assured. Such assessment will only reach the tax-payers' interest in the land.

5. Under section 1108, Gen. Stats., it is a good answer for a defendant when assessed for a possessory claim to land to deny such claim, and plead that whatever claim it has is exempt from taxation.

6. The possessory claim to public land which may be taxed as something separate and distinct from the title in fee, is an actual possession, and not a constructive possession or a mere claim to the land. Mortgaging and leasing public land, do not constitute actual possession thereof.

7. Where, upon payment of taxes, the statute requires the tax-receiver to give a receipt, a tender of taxes is not rendered invalid because such receipt is demanded.

70 *Opinion by Bigelow, J.*

In this case there are cross-appeals, but for convenience they will be considered together. In the year 1888 the defendant was assessed upon its railroad and a large amount of other property, including the possessory claim to both surveyed and unsurveyed lands, embraced within the United States land grants of 1862 and 1864 to the Pacific railroads. Upon all the property, except land, the defendant tendered the taxes due before they became delinquent, and subsequent to the commencement of the action, upon demand of the district attorney, the amount so tendered was paid to him. The action was then continued for the purpose of recovering the taxes due upon the lands and the penalties upon the other taxes assessed, upon the theory that the tender was not sufficient. The State recovered for the taxes and penalties upon the surveyed lands, and from this part of the judgment the defendant appeals. But the court held that the unsurveyed lands were not subject to taxation, and that the tender and payment of the other taxes were sufficient to avoid the penalties, and from these rulings the State appeals.

In our judgment the questions presented concerning the taxability of the surveyed and unsurveyed lands have been substantially settled by this court in the cases of The State *vs.* C. P. R. R., 20 Nev., 372, and The State *vs.* C. P. R. R., 25 Pac. Rep., 442, which were followed by the court below, but notwithstanding, as new points are urged upon these appeals, we have given the matter a careful reconsideration.

Taxation of surveyed but unpatented lands within the Pacific grants.

A part of the lands assessed were patented to the defendant, and as to these it seems to be admitted that the judgment is correct; but, as is well known, the Supreme Court of the United States, in the cases of Railway Co. *vs.* Prescott, 16 Wall., 603; Railway Co. *vs.*

McShane, 22 Wall., 444, and Railway Co. *vs.* Trail County, 115 U. S., 600, held that the United States still retained a lien upon the unpatented lands for the cost of surveying, selecting and conveying them, and that until such costs were paid the lands were not subject to State taxation for the reason, as stated, that to permit a sale of them for taxes would destroy that lien, or at least embarrass the Government in the assertion of its right to recover such costs. As it was also held that the grants were grants *in presenti*, conveying to the companies the full beneficial ownership of the lands, including the right of possession, there was no occasion for them to pay such costs, and the result was that for years the Pacific railroads substantially escaped all taxation upon the grants. To remedy this Congress, by act of July 10, 1886 (U. S. Statutes, 1885–'86, 143), enacted that no such lands, except unsurveyed lands, should be exempt from taxation by reason of that lien; provided that at any sale for taxes the purchaser must take the land sold subject to the lien, and further, that at such sale the United States may become a preferred purchaser, in which case the lands sold shall be restored to the public domain.

As we understand the defendant's contention, it is now urged that Congress did not intend by this act to entirely waive this lien and make the land absolutely subject to State taxation, but only upon the condition that the lien of the Government for such costs should still subsist, and that at any sale for taxes the United States may be a preferred purchaser. Upon this postulate it is then argued that as it was held in the cases mentioned that a sale by the State for taxes would destroy the lien, in the absence of a legislative act accepting the conditions mentioned, a sale by the State would still have the same effect, and consequently the right to tax does not yet exist; also that in the absence of a legislative act authorizing it, the United States has no right to become a preferred purchaser at a tax sale, and consequently this condition has not been fulfilled. Whatever difficulty there may be in rendering a decision that will be entirely in harmony with the principles asserted in Railway Co. *vs.* Prescott and cases following it, we think that several satisfactory answers may be made to this argument.

1. As the sovereign proprietor Congress has full power to dispose of the public lands upon such terms and under such conditions as it may deem proper.

Irvine *vs.* Marshall, 20 How., 561; Vansickle *vs.* Haines, 7 Nev., 261.

Thus in Gibson *vs.* Chateau, 13 Wall, 99, it is said: "With respect to the public domain the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has no absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made." It will scarcely be denied that the right which the United States still has in this land is an interest in the public domain, as such, and over which it has

such full authority. Having such authority no reason is
71 perceived why the provisos in the act of July 10, 1886, do not become the supreme law of the land, so far as the taxation of these grants is concerned. Admittedly, Congress has no right to enact laws regulating generally the assessment, the taxation, or the sale for taxes, of property in the different States. But as to these lands the United States is both a proprietor and a sovereign. The acts of Congress disposing of them become general laws binding upon all because all such acts are specially within the powers conferred upon it by the Constitution. There is nothing in the act of July 10 indicating that Congress expected a legislative acceptance by the States of the terms proposed, and in our judgment there is no occasion for such acceptance. The act is a grant to the States and Territories, in which the conditions become the controlling law. That act and the State statutes concerning revenue must be construed together. All the State laws apply to the taxation of these lands until the- come in conflict with the conditions prescribed by Congress and then they must give way. Thus construed, we perceive no reason why they may not without further legislation, work harmoniously together.

2. As just stated, the act of July 10, 1886, is a grant to the State, granting it the privilege, so far as the United States is concerned, of taxing a large amount of property which previously had not been subject to taxation. It conferred a benefit upon the State to the acceptance of which there can be no possible ejection. Under these circumstances, conceding it to be necessary that the State should have accepted the conditions of the grant in the absence of a showing that it has refused to do so, such acceptance is to be presumed.

Fort Leavenworth R. R. Co. *vs.* Lowe, 114 U. S. 525; S. C., 27 Kan., 749.

Again, it would seem that the fact that these lands have been assessed by the State, and that the State is now in court endeavoring to enforce that assessment which, without this act, it clearly had no right to assess, should, of itself, be considered an acceptance of the conditions therein contained.

3. It will be noticed that it is only the possessory claim to this land that is assessed. Whatever may be the meaning of this term "possessory claim," and we shall consider it more at length hereafter, it is evident that the thing attempted to be taxed is something less than the fee. While in view of the fact that any sale of Government land for taxes is simply null and void (McGoon *vs.* Seales, 9 Wall., 23; Black Tax Titles, sec. 129) it is difficult to understand how any such sale could ever affect the Government title or its lien upon the land, it is clear, under the decisions, that it would not do so here. Against such an assessment, what may be said of its validity otherwise, no objection could be made on the ground that it was an attempt to subject the property of the United States to taxation. Nothing but the defendant's interest in the land can be reached by such an assessment. It cannot possibly affect the

Government title or lien any more than a voluntary sale by the defendant would do so.

Wright *vs.* Cradlebough, 3 Nev., 341; Forbes *vs.* Gracey, 94 U. S. 762.

We conclude that the surveyed lands were property held to be subject to taxation.

Possessory claims to unsurveyed lands.

The answer denies that the defendant had any possession, possessory claim, or possessory interest in the land assessed, or any right or interest therein, except such as is derived under the land grants already mentioned. It is contended that this is insufficient because it does not comply with Gen. Stats., sec. 1108, and deny "all claim, title or interest in the property assessed."

All real estate, whether it is the title in fee or the possessory claim that is assessed, is to be assessed to the owner; if it is not the assessment is void. Sometimes, however, there is more than one person claiming to be the owner, and justice does not require that the rule stated shall be extended further than is necessary for the protection of the parties interested in the property. It is often difficult to determine among several claimants who the true owner is, and the statute has consequently provided that the one to whom it is assessed must, to avoid the assessment, not only plead that he is not the owner, but also deny all claim, title or interest in the property. But section 1108 provides for several defenses besides this denial; among others that the property is exempt from taxation. The defendant may plead any or all of these defenses, or set up one as to part of the property and others as to the rest. If he is assessed for the land itself instead of the possessory claim, and the title is still in the Government, under the plea of exemption of United States property, he may escape all taxation. Wright *vs.* Cradlebough, 3 Nev., 341. Lands held under the pre-emption or homestead law is exempt from taxation until the issuance of the final certificate, and this is a defense available to the pre-emption or homestead claimant. Carroll *vs.* Safford, 3 How., 441; Witherspoon *vs.* Duncan, 4 Wall., 210. But here we have a case where there may be two estates in the same land—title in fee and title in possession—of which one is subject to taxation and the other is not. What possible reason can there be for refusing to allow the taxpayer to deny, under one clause of the statute, the claim or ownership which is subject to assessment, and plead that the other is exempt? The facts are what constitute the defense, and not the technical manner in which they are stated. To illustrate, in this very case, although the answer denies possession or possessory claim to the surveyed land, it does not state facts showing that the defendant has not such an interest in that land as is subject to taxation, and consequently the answer as to such land is insufficient. But as to the unsurveyed land the title is still in the Government, and we held upon the former appeal of the case (25 Pac. Rep., 442) that whatever claim it had by virtue of its grant alone, is exempt

from taxation. Then if it has no possessory claim thereto, it has nothing that can be taxed. The defenses set up are certainly within the spirit and meaning of the act, and we conclude that the answer is sufficient.

Do the facts show that the defendant has a possessory claim to this land within the meaning of the revenue law?

Gen. Stats., sec. 1088 direct that "all real estate including the ownership, or claim to, or possession of, or right of possession of any land or improvements," shall be subject to assessment. Upon this point it is stipulated "that said defendant has heretofore mortgaged said lands described in the complaint and has at divers times leased various portions of it. That said defendant has never had any other possession of any part of said lands than such as may be inferred from executing said mortgages and leases and by virtue of the land grants to it of 1862 and 1864."

Generally, it is the full ownership—the title in fee of lands, or what is equivalent to it—that is assessed. In the absence of a showing to the contrary, it is presumed that the assessment is based upon this title.

72. Wright *vs.* Cradlebaugh, *supra.* It is believed that the case of possessory claims to the public lands is the only exception to this rule.

But in the new States and Territories, where the settlements were generally in advance of the public surveys, it was found that often large and valuable properties were situated upon land to which no title could be obtained. Under such circumstances it became a necessity that some rule should be found for determining in whom the right to this property lay, and the most natural as well as equitable, was, that it belonged to the first possessor or his grantees. Accordingly such possession has been treated as title sufficient to maintain trespass, ejectment and many other actions. Such possessory interests have been subject to contract and sale almost as freely as title in fee. They descend to the heir and constitute assets of the estate in the hands of the executor or administrator. But such possession, to be of any validity, must be actual and substantial. It "must be an actual occupation, a complete subjugation to the will and control, *a pedis possessio.* The mere assertion of title, the casual or occasional doing of some act upon the premises have never been held sufficient. * * * By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property."

Robinson *vs.* Imp. Mining Co., 5 Nev., 44, 66, 67; Coryell *vs.* Cain, 16 Cal., 573.

Unable to tax the land itself, by reason of the title being in the United States, the plan was evolved of taxing this possession and possessory right as something separate and distinct from the title, and which was, in all other ways, treated as property. There were then two titles which subjected land to State taxation. First, title in fee,

secondly, where title was still in the Government, but the person taxed was the owner of the right to the actual possession This possession is something entirely separate and distinct from the title and in nowise dependent upon it. It is not the possession that is presumed to follow the title. The very situation which induced the legislature to adopt the scheme of taxing possessory claims, shows that it was actual possession that was meant. If the title was in the individual, the land was what was taxed. If it was public land and unoccupied there was nothing subject to taxation. If occupied, it was the actual possession of the land, with the improvements placed thereon, that constituted the property to be assessed.

While the language of the statute is quite broad, it must be remembered that it is always property, and not a mere claim to it, that is to be assessed. The terms used must be considered as largely convertible and synonymous. This is the view that seems to have been taken by the courts. Thus in Peo. *vs.* Frisbie, 31 Cal., 146, it is said, "The term 'claim' as used in this provision means something more than the mere assertion of the party assessed that he owns the property described in the list. While the word carries with it the idea of such assertion, it involves also the idea of an actual possession of the land claimed," it is "possession claiming the land" that is liable to be taxed.

Barrett *vs.* Amerein, 53 Cal., 322; State *vs.* Moore, 12 *id.*, 56; People *vs.* Shearer, 30 *id.*, 645; Hale & Norcross Co. *vs.* Storey Co., 1 Nev., 104, are to the same effect.

As appears from the stipulation, the defendant here has never had any actual possession of the land. So far as shown there is no actual possession in any one to which it can make any claim, nor does it make any. The fact that the defendant has mortgaged the land or leased it, neither constitutes actual possession, or any claim to such possession, nor do these instruments confer upon the mortgagee or lessee any right to the possession. Under these circumstances the title to the land not being subject to taxation, there is nothing else to tax.

Tender.

In our judgment the tender of the taxes to the treasurer, as *ex officio* tax-receiver, and their subsequent payment to the district attorney, were sufficient to avoid the penalties. The defendant at the proper time tendered all the taxes due upon all its property except land. We held upon the former appeal that it had a right to make such payment, and need not tender the full amount due upon the entire assessment, which included other subdivisions of property. The tender was doubtless refused upon the theory that the defendant must pay upon all or none. The receipt demanded seems to have been in proper form, and was one that the statute (Gen. Stats., sec. 1096) requires the tax-receiver to give upon payment of the taxes. Whatever may be the general rule as to the validity of a tender accompanied by a demand for a receipt for the debt, we are

clearly of the opinion that where the statute requires such receipt to be given, it is a right that the debtor may insist upon.

2 Bus. Sales, sec. 1078; Cole *vs.* Blake, Peake, 179; Saunders *vs.* Frast, 5 Pick., 270.

Again, the only objection seems to have been to the amount of money tendered, and not to the demand for a receipt. Under such circumstances it seems just to hold that any objection to the receipt or its form, was waived.

2 Whar. Cont., section 977; Richardson *vs.* Jackson, 8 M. and W., 208.

The money being promptly paid to the district attorney when demanded by him, it must be presumed that the tender was kept good.

The judgment and orders overruling motions for new trial are affirmed.

BIGELOW, *J.*

We concur.

MURPHY, *J.*
BELKNAP, *C. J.*

(Endorsed:) Filed August 8, 1892. Joe Josephs, clerk supreme court, Nevada.

73 *Judgment of Supreme Court.*

In Supreme Court, State of Nevada.

THE STATE OF NEVADA, Respondent, *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY, Appellant. } Appeal from the District Court, Lander County, Nevada. No. 1356.

The above-entitled cause came regularly on to be heard at a former day, when the same was regularly submitted on briefs filed by counsel for the respective parties, — was taken under advisement by the court.

And now, on this day, all and singular the law and the premises having been seen, heard, and fully considered, the opinion of the court is delivered by Bigelow, J.—Murphy, J., and Belknap, C. J., concurring—to the effect that the judgment of the lower court is affirmed.

Whereupon it is now ordered, adjudged, and decreed by the court that the judgment of the district court in the State of Nevada in and for Lander county in the above-entitled cause, for an action brought for taxes for the year 1888, be, and the same is hereby, affirmed, with costs.

Judgment rendered August 8, 1892.

74 *Assignment of Error.*

In the Supreme Court of the United States.

CENTRAL PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE STATE OF NEVADA, Defendant in Error.

The Central Pacific Railroad Company, as plaintiff in error, in conjunction with its petition, herewith filed, praying for the allowance of a writ of error, herein submits the following assignments of error as having occurred in the making, rendering, and entering the judgment of affirmance mentioned in said petition in said action in the supreme court of the State of Nevada, to wit:

I.

The supreme court of the State of Nevada erred in affirming the judgment of the lower court as mentioned in the petition for the allowance of a writ of error filed herein by plaintiff in error.

II.

The supreme court of the State of Nevada erred in not reversing the judgment of said lower court wherein said lower court
75 held and adjudged that the 122,824 acres of land mentioned in the records herein were subject to State and municipal taxation for the year 1888, and in holding and adjudging that the plaintiff in error was liable for the State and municipal taxes claimed and alleged to be due from plaintiff in error to defendant in error upon said lands for the year 1888.

III.

The supreme court of the State of Nevada erred in holding and deciding that that certain act of Congress entitled "An act to provide for taxation of railroad grant lands, and for other purposes," approved July 10, 1886, granted to and conferred upon the State of Nevada the right, power, and authority to levy and collect a tax upon said 122,824 acres of land for the year 1888.

IV.

The supreme court of the State of Nevada erred in holding and adjudging that there was no necessity for an acceptance by the State of Nevada of the terms and conditions imposed upon the State of Nevada by said act of Congress.

76 V.

The supreme court of the State of Nevada erred in holding and adjudging that lands embraced and included in the land grant of the United States to the Pacific railroads, upon which the costs of surveying, selecting, and conveying had not been paid, were subject to taxation by the State of Nevada for the year 1888.

VI.

The supreme court of the State of Nevada erred in affirming the judgment of the district court of the State of Nevada in and for Lander county, whereby and wherein said district court had ordered, rendered, and entered a judgment against plaintiff in error and in favor of defendant in error for the State and municipal taxes of the year 1888 upon 122,824 acres of land, at an assessed value of fifty cents per acre upon a tax levy of $3.80 per $100 valuation.

Wherefore, upon the foregoing assignments of errors, the plaintiff in error prays that the said judgment of the said supreme court of the State of Nevada may be reviewed, corrected, and reversed,
77 and that said plaintiff in error may have all such proper relief as it may be entitled to in the premises and under the law.

Respectfully submitted.

BAKER, WINES & DORSEY,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed September 6, 1892. Joe Josephs, clerk supreme court, Nevada.

78 STATE OF NEVADA, *ss.*:

In the Supreme Court.

THE STATE OF NEVADA, Respondent,
v.
THE CENTRAL PACIFIC RAILROAD COMPANY, Appellant.

I, Joe Josephs, clerk of the supreme court of the State of Nevada, do hereby certify that the foregoing seventy-seven pages contain a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same, in the above-entitled cause; that the original writ of error and the citation, with its service endorsed thereon, are appended to the return herein, and that they are all returned to Supreme Court of the United States, in obedience to the command of the writ of error hereto annexed.

Seal Supreme Court, State of Nevada.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Carson City, Nevada, this ninth day of September, A. D. 1892.

JOE JOSEPHS,
Clerk Supreme Court, Nevada.

Endorsed on cover: Case No. 15,159. Nevada supreme court. Term No., 170. The Central Pacific Railroad Company, plaintiff in error, *vs.* The State of Nevada. Filed October 5th, 1892.

170 vc

Office Supreme Court, U.S.
FILED
MAR 20 1896
JAMES H. McKENNEY,
CLERK.

United States Circuit Court,

DISTRICT OF WASHINGTON—WESTERN DIVISION.

THOMAS F. OAKES ET AL.,
Plaintiffs,

vs.

JOHN GALVIN, Treasurer Lewis County,
Defendant.

Decision overruling demurrer to Bill for an Injunction.

HANFORD, District Judge (Orally):

It seems to me that the main question in the case, as to whether the lands are taxable or non-taxable—that is, whether they are liable for the taxes for the years 1890-'91, is identical with the question involved in the land tax case in Montana, which was decided by Judge BEATTY. That is one decision in this Circuit. And while I would not necessarily follow the decision of another Court of equal rank with this Court, the matter of uniformity in decisions is of some account, so I will give consideration to that decision, for my own mind is in doubt. I have read it carefully, and I have read the decison in the Barden case and the decisions of the Supreme Court, which held that after private ownership has attached lands are taxable before patents issue. My mind is as well prepared to decide this matter at once, as it will be if I should take time for more argument and deliberation.

The question in this case is whether the lands are subject to taxation as private property. So long as the Government has the legal title, and also a substantial right to claim the land and retains the control, it is not taxable as private property. It is only after the right of some person has matured that individual ownership is regarded as being for all purposes a complete and substantial ownership, and the property becomes subject to taxation as private

property. No interest of the Railroad Company in this land can be taxable until the Company has acquired the title. The idea that there may be an equitable interest that is taxable, is not correct. The Railroad interest in this land which is subject to taxation, if any, is its interest as owner of the land. Until it has become the owner—until its right has fully matured—the title of the Government cannot be divested or encumbered by tax proceedings. While the grant to the Northern Pacific Railroad Company is, in some respects, a grant *in præsenti*, the lands which passed by the grant had to be identified before the Railroad Company could claim to be the owner. It was formerly understood to be the law that so much of the grant within the place limits became identified, and the grant ceased to be a float after the definite location of the road; and upon that idea of the law, which was supported by numerous decisions of the Supreme Court of the United States, the idea became fixed that when the route of the Railroad was definitely located the grant became operative, and when the Company had earned the land by building the road its title had then matured, at least after the lands were surveyed, the title was then matured, so that it was to all intents and purposes the property of the Railroad, and subject to taxation. But the grant is not a grant to all the lands within place limits. It is only a grant to public lands, non-mineral in character, to which there had been no other conveyance or disposition by the United States, or no claim under the pre-emption or homestead laws, or any other grant. The question as to the mineral or non-mineral character affecting the question as to whether the land within the place limits of the grant should pass to the Railroad Company or not, has been very perplexing indeed. It has been contended by prospectors and miners that the right of miners and prospectors to go upon the odd-numbered sections within the place limits of this grant is unlimited and perpetual, and that when mineral in paying quantities was discovered on an odd section it took that section out of the grant, and the same became subject to entry under the mining laws of the United States. Against that contention, it has been insisted that the title must be somewhere, and that title must be known. There must be some way by which the Government, and the Railroad Company, and the public, can know what lands had been granted, and what had not, and that only such lands were reserved as mineral lands as were known to be mineral in character at the time when the grant ceased to be afloat. That idea was supported by dicta in one or two de-

cisions of the Supreme Court of the United States, and was decided to be correct by Judge SAWYER in his opinion in the Barden case. Judge SAWYER has been reversed on that subject by the Supreme Court, and the Supreme Court, whatever others may say about it, in that decision has undoubtedly modified the views which before had been expressed by the Court in regard to the time when the railroad grant became operative to convey the title out of the Government and vest it in the railroad. Instead of being a complete vested title at the time of the definite location of the road, and earning of the grant by building the road, and issuing of certificates of acceptance, under the direction of the President, the land department, after all that, retains such control of this property that it may award an odd-numbered section to a person claiming it as mineral land after it should be satisfactorily determined that it was mineral, and subject to be taken as mineral. As long as the *jus disponendi* remains in the Government, it cannot be contended logically that the right of the Railroad Company has matured or become vested.

The Supreme Court, in the Barden case, suggests, in answer to the argument, that there seems to be a necessity for some way by which the people may know who owns the land; that the Land Department has power under the general laws giving it control of the public domain to determine the question whether or not the land is mineral or agricultural in character, so as to be subject to this grant or not, and it is suggested that the issuance of a patent will be effective as a determination by the Land Department of that question. Now, that does not determine necessarily that a patent is actually necessary and essential to the conveyance of title; but, if a patent does issue, it is to be regarded as a determination of the Land Department. The Land Department may, by some other positive method, under the terms of that decision, determine the question, and when everything has been done that is necessary to pass the title from the Government to the Railroad Company, except the issuance of the patent, the title may be as fully vested before the patent as afterwards. But from the argument you have made, it seems to me that it is shown by the allegations of this bill, that it refers to land for which no patent has been issued, and as to which the mineral or nonmineral character had not been determined, at the time the tax was levied; that the Land Department of the United States still had control and power, and was competent to dispose of this land to persons other than the Railroad

Company, under the laws of the United States. This being so, here is land in which the Government has a legal title and a substantial interest, and as to which the Railroad title has not matured. I think it is beyond the power of the State to subject it to taxation.

I think it is true, also, that the power of taxing officers to subject land to sale after the Receivers were appointed, was cut off under the decision of the Supreme Court in the Tyler case, 149 U. S., 164. The officers, to recover the tax claimed to be due, should petition the Court for an order on the Receivers to pay the tax. After going into the custody of the Court, the land was not subject to sale. The proceedings in the Courts of the different Counties, while perhaps in a measure and in some degrees similar to proceedings *in rem*, are not proceedings in which a State Court had taken legal custody of the property, and after the property had passed to the Receivers of this Court, it would not be subject to sale under process of a State Court. The remedy as shown in the Tyler case is to apply to the Court for an order requiring the Receivers to pay the taxes.

In view of the decision in the Barden case, I do not think the lands to which the mineral character has not been determined is subject to taxation. I think the Receivers have such an interest in preserving the title from being clouded that, although the land is not subject to taxation, they have a standing in Court to resist the sale of the property under process giving color of right. It does not follow logically that, if they have an interest in the property which entitles them to litigate, they have an interest subject to taxation. A person may have a prospective interest in property which will give him good grounds to seek protection of the Courts against any spoliation of that property or clouding of the title, although he has not an interest in it that is taxable.

The fact that this property is in an agricultural region, and not a mineral region, is not sufficient to raise the presumption that it is non-mineral in character ; that fact does not affect the power of the Interior Department to decide that it is mineral. We have an instance where land within the corporate limits of Tacoma has been held by the Commissioner of the General Land Office to be mineral land, and liable to be taken as mineral land under the laws of the United States, and I cannot say how much of that sand about Pasco may contain precious metal in sufficient quantities to pay for working, when some process is discovered to extract it. Lewis County is a country with extended and various resources, and a great deal

of its natural wealth has not been discovered yet. I certainly think it is unsafe for the Court to determine as a matter of law that this is not mineral land, until the Interior Department has been heard from on that subject. I overrule the demurrer.

Exceptions taken by opposing counsel and allowed.

UNITED STATES OF AMERICA,
District of Washington, } ss.:

I, A. REEVES AYRES, Clerk of the Circuit Court of the United States for the District of Washington, do hereby certify that I have compared the foregoing copy with the original Opinion in the foregoing entitled cause, now on file in my office at Tacoma, and that the same is a true and perfect transcript of said original, and of the whole thereof.

Witness my hand and the seal of said Court this 11th day of January, A. D. 1896.

A. REEVES AYRES,
Clerk.
By R. M. HOPKINS,
Deputy.

Office Supreme Court U. S.
FILED.
JAN 14 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE CENTRAL PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

AGAINST

THE STATE OF NEVADA,
Defendant in Error.

170

This is a writ of error to the Supreme Court of the State of Nevada.

Statement.

The State of Nevada, defendant in error, was plaintiff below, and under the Statutes of the State of Nevada brought its suit in the District Court of the State of Nevada in and for Lander County against the plaintiff in error, Central Pacific Railroad Company, *and against certain property*, real estate and improvements described in the complaint filed in such suit.

The object of the action was to collect certain taxes which had been levied upon certain real estate alleged to be the property of the Central Pacific Railroad Company, and the suit was at once a suit *in rem* and a suit *in personam*.

The statutory machinery for the collection of taxes in Nevada provides for bringing a suit against the person to whom the property is alleged to belong, and also against the property itself, and that the judgment rendered shall be one at once against the person to whom the property belongs and also against such property itself, a lien on such property being given by the statute.

The railroad company answered the complaint and denied that it owned or possessed any lands subject to taxation by the State, and disclaimed any interest in the lands described in the complaint other than that derived by and through the statutes of the United

States of 1862 and 1864 granting lands to the Pacific Railroads, and by an amendment to its answer alleged that the costs of surveying, selecting and patenting said lands had never been paid to the United States, and that the same were due and unpaid. The suit was tried upon a stipulation as to the facts in the following language: "It is hereby stipulated and agreed that of the land described in the amended complaint on file herein 131,386 acres are surveyed, but unpatented, and the same were assessed for the year 1888 at fifty cents per acre by the assessor of said county. That the patented lands embraced in said complaint amounted to 24,123 acres, and the same were assessed at $1.25 per acre for the said year by the said assessors. That of the lands described in said complaint 195,200 acres are unsurveyed, 2,080 acres were sold and conveyed by defendant and 960 were beyond the limits of the grants to said defendant and were not its property, and the said lands were assessed for said year by said assessor at fifty cents per acre. That the tax levy for said year was $3.80 on each $100. That the costs of surveying, selecting and conveying 122,824 acres of said surveyed unpatented lands above mentioned have not been paid. That said defendant has heretofore mortgaged said lands described in said complaint, and has at divers times leased various portions thereof. That said defendant has never had any other possession of any part of said lands than such as may be inferred from executing said mortgages and leases and by virtue of the land grants to it of 1862 and 1864" (see Record, pp. 18 and 19).

The District Court held that the plaintiff State of Nevada was entitled to recover for the taxes levied on the patented lands, also for the taxes levied on unpatented but surveyed lands on which the costs of surveying had not been paid, and held that the State was not entitled to recover for taxes levied on unsurveyed lands (see opinion of the Judge of the District Court and judgment of Court, pp. 19 to 22). To that judgment the defendant excepted, stating as one of its reasons for such exception that the decision and judgment showed that the same was rendered upon 131,386 acres of surveyed but unpatented lands at an assessed valuation of fifty cents per acre, while the evidence, as contained in said agreed statement of facts, showed that said 131,386 acres of surveyed unpatented lands contained, embraced and were made up in part of 122,824 acres of land upon which the costs due to the Government of the United States for the surveying, selecting and patenting of the same have never been paid (Record, p. 23, fols. 53 to 54).

On cross-appeals the judgment of the District Court was by the Supreme Court of the State of Nevada affirmed. The opinion is found on page 31 of the record, and the part of it which refers to the question presented to this Court is found under the heading "Taxation of Surveyed but Unpatented Lands within the Pacific Grants," on page 31 of the record.

From that decision the Central Pacific Railroad Company has sued out a writ of error to this Court. Its assignment of error is found on pages 38 and 39 of the record.

The plaintiff in error now assigns for error in this court that the Court below has awarded judgment to the plaintiff below for the taxes assessed on 122,824 acres of surveyed unpatented lands upon which the costs of surveying, selecting and conveying had not at the time of such assignment, or since, been paid, and of which the plaintiff in error has never been in possession.

ARGUMENT.

First. It is essential, on the threshold of the discussion, to clearly apprehend what is the action of the State of Nevada, of which the plaintiff in error complains.

To do so, we must refer to the Nevada tax statutes, under which the action has been taken.

They are found in the "General Statutes of Nevada," Baily & Hammond, 1885, Ch. 9, under the heading "Revenue Taxes," and are substantially as follows:

"1077. SEC. 1. For the fiscal year commencing January 1, 1881, and annually thereafter, an *ad valorem* tax of 90 cts. on each $100 of taxable property is hereby levied and declared to be collected for State purposes upon all taxable property in this State." * * *

"1079. SEC. 3. Every tax levied under the provisions or authority of this act is hereby made a lien against the property assessed, * * * and shall not be satisfied or removed until all the taxes are paid or the property has absolutely vested in a purchaser under a sale for taxes.

"108. SEC. 4. All property of every kind and nature whatsoever within this State shall be subject to taxatiou except:

" FIRST. All lands and other property owned by the State or by the United States, or by any county, etc., etc.

" SECOND. Mines and mining claims; provided that nothing in this section shall be so construed as to exempt from taxation possessory claims to the public lands of the United States or of this State, or the proceeds of the mines, and provided further, that nothing herein shall be so construed as to interfere with the primary title to the lands belonging to the United States.

" 1081. SEC. 5. The term real estate when used in this act shall be deemed and taken to mean and include, and it is hereby declared to mean and include * * * the ownership of or claim to or possession of or right of possession to any lands wirhin the State, and the claim by or the possession of any person, firm or corporation, association or company to any land, and the same shall be listed under the head of real estate.

" 1082. SEC. 6. Between the first Monday in March and the first Monday in September in each year the County Assessor * * * shall ascertain by diligent enquiry and examination all property in his county, real or personal, subject to taxation, and also the names of all persons, etc., owning the same.

" He shall demand from each person and firm and from the president, etc., a statement under oath of all real estate * * * within the County owned by such persons, firm, corporation, etc.

" 1088. Sec. 12. It is the duty of the assessor to prepare a tax list or assessment roll, in which shall be stated, among other things, 'all real estate, including the ownership or claim to, or possession of, or right of possession to, any land and improvements * * * described by metes and bounds, or by common designation or name.'

" A form is given as follows:

" Taxpayer's name .....

" Description of Property .....

" Real Estate, Number of Acres .....

" Possessory Claim, Number of Acres .....

" Section .....

" Number of Lot .....

" Number of Block .....

	Dollars.	Cents.
" Value of Real Estate or Possessory Claim and Improvements		
" Value of Improvements on Real Estate or Possessory Claim Assessed to persons other than the owners of said real estate or possessory claim.		

"1104. Sec. 28. The Auditor is required to hand the delinquent list to the District or Prosecuting Attorney, and to publish a certain notice.

"1105. Sec. 29. The prosecuting attorney is required to commence suit by complaint in the form given in 1106, Sec. 30, in name of State of Nevada 'against the person or persons so delinquent, and against the real estate and improvements assessed so delinquent, * * * to recover such delinquent taxes.'

"1106. Sec. 30. The prayer is, 'Wherefore said plaintiff prays judgment against A. B. for the sum of dollars (the whole of said tax), and separate judgment against said real estate and improvements for the sum of dollars (the tax due on real estate and improvements and personal property), and the ten per cent. damages for nonpayment thereof at the time,' etc.

"1108. Sec. 32. Defendant may answer:

"1. Taxes paid before suit.

"2. Taxes, with costs, paid since suit, or that such property is exempt from taxation under the provisions of Sec. 4.

"3. Denying all claim, title or interest in the property assessed at the time of the assessment.

"4. Land assessed in another county and taxes paid.

"5. Fraud in the assessment; 'and no other answer shall be permitted.'

"1111. Sec. 35. Provides for enforcing the payment by sale of the lands, etc.

"1112. Sec. 36. Any deed derived from the sale of real property under this act shall be conclusive evidence of the title, except as against actual frauds, * * * and shall entitle the holder thereof to the possession of such property, which possession may be obtained by action in a Justice's Court for the unlawful withholding thereof in the same manner as where tenants hold over after the expiration of their lease; provided that the officer in *selling such property shall only sell the smallest quantity* that will pay the judgment and all costs.

"All sales of real estate sold for taxes shall be subject to redemption at any time within six months after date of sale by payment of all costs connected with the suit and sale, together with interest at the rate of 3% per month from date of sale up to time of redemption.

The tax statutes of the State of Nevada thus provide for the taxing of two separate interests in real estate, viz.:

(a) The whole estate as described on the tax list or assessment roll under the title " Real Estate, Number of Acres ; " and

(b) A less estate, but involving possession described on the tax list or assessment roll under the title, " Possessory Claim, Number of Acres."

This action was brought by the State of Nevada on the ground that the defendant below had a " possessory claim " to certain lands which the proper officials of the State had assessed for taxes and on which the defendant below had not paid the taxes (see Complaint, Record, p. 9, " Possessory claim to the following described tracts and parcels of land," &c.).

The answer of defendant below (after dealing with certain allegations of the complaint as to assessment and non-payment of taxes on its roadbed, &c., and raising questions as to the same, which were satisfactorily determined by the Court below, and which are not before this Court) denied that it had any possessory claim in or to said lands, and alleged that the only interest of defendant below in said lands was that derived from the acts of Congress of 1862 and 1864, making certain grants to the Pacific Railroad Companies, and that as to such lands a portion were unsurveyed and unpatented—a portion surveyed but unpatented and costs of survey unpaid, and but a small portion patented (Record, p. 14, fol. 34, to p. 18, including fol. 42).

The pleadings thus presented a direct issue as to whether the defendant below had a " possessory claim " in these lands which could be taxed or assessed by the State of Nevada.

On that issue the only evidence is the stipulation hereinabove recited and found in the record (pp. 18, 19).

It is that the defendant *never had any other* possession of any part of said lands than such as may *be inferred* from executing said mortgages and leases and by virtue of the land grants (p. 19).

The Court below in construing the tax statute of Nevada above recited in this case has held that the terms " possessory claims," " claim to possession or right to possession," to any lands do not mean such right or claim when not accompanied by actual possession (see Opinion Court below, Record, p. 34, under heading " Possessory Claim to Unsurveyed Lands."

On page 35 the Court says : " But such possession, to be of any validity, must be actual and substantial. It must be an actual occupation, a complete subjugation, to the will, and control *a pedis*

possessio. The mere assertion of title, the casual or occasional doing of some act upon the premises, have never been held sufficient. * * * By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation or by appropriate use according to the particular locality and quality of the property." Citing on page 35 and on page 36 several California cases and a former decision of the Supreme Court of Nevada.

On page 36 the Court says: "While the language of the statute" (Nevada tax statute) "is quite broad, it must be remembered that it is always *property*, and *not a mere claim* to it, that is to be assessed. The terms used must be considered as largely convertible and synonymous. This is the view that seems to have been taken by the courts. Thus in Peo. vs. Frisbie, 31 Cal., 146, it is said: "The term 'claim,' as used in this provision, means something more than the mere assertion of the party assessed that he owns the property described in the list. While the word carries with it the idea of such assertion, it involves also the idea of an actual possession of the land claimed; it is '*possession claiming the land*' that is liable to be taxed."

The Court then adds:

"As appears from the stipulation the defendant here has never had any actual possession of the land. So far as shown there is no actual possession in any one to which it can make any claim, nor does it make any. The fact that the defendant has mortgaged the land or leased it neither constitutes actual possession or any claim to such possession, nor do these instruments confer upon the mortgagee or lessee any right to the possession. *Under these* circumstances *the title to the land* not being subject to taxation there *is nothing else to tax.*

The same doctrine had before been held by the Nevada Supreme Court in State vs. R. R. Co., 20 Nevada, 372 (25 Pacific Reporter, 442), and was the settled law of the State.

This construction of the meaning of the words "possessory claim," &c., in the Nevada statute by the highest Court of that State, it is well settled, is binding on and will be followed by this Court; and it is *the judgment* in this case.

Nesmith vs. Sheldon, 7 Howd., 812.
Tanfield Co. vs. Gallatin, 100 U. S., 47, and cases cited, p. 52.
Suydam vs. Williamson, 24 Howd., 427.
Ridings vs. Johnson, 128 U. S., p. 224, and cases cited.

In People vs. Weaver, 100 U. S., 539, the rule is applied to a State tax statute.

This construction of the terms "possessory claims," &c., of course, applies to the assessment on surveyed unpatented lands equally with unsurveyed unpatented.

The stipulation is the same as to both classes, and it is "that defendant below never had any other possession of any part of said lands," referring to the whole 195,200 acres, "than such as may be inferred from executing said mortgages," &c.

It must follow in the language of the Court below that "there is nothing to tax" unless "the *title* is subject to taxation."

Now this Court has held in repeated adjudications that *the title* to surveyed, unpatented lands on which the costs of survey have not been paid is not subject to taxation.

Railway Co. vs. Prescott, 16 Wall., 603.
Railway Co. vs. McShane, 22 Wall., 444.
Railway Co. vs. Trail Co., 115 U. S., 600.
Amkeny vs. Clark, 148 U. S., 345.

Indeed, the Court below recognizes that the said construction of the terms "possessory claims," &c., applies to surveyed as well as to unsurveyed lands when it says that the Act of Congress of July 10, 1886, is a grant to the State of the power "of taxing a large amount of property *which previously had not been subject to taxation*" (Record, p. 33, paragraph 2).

And, also, on pages 31 and 32 of Record, at the beginning of its opinion, the Court distinctly recognizes the fact that but for the Statute of 1886, surveyed lands in Nevada on which the fees of survey had not been paid could not be taxed under the Nevada Statute. The Court says, page 31: "A part of the lands assessed were patented to the defendant, and as to these it seems to be admitted that the judgment is correct; but, as is well known, the Supreme Court of the United States in the case of Railway Co. vs. Prescott * * * held that the United States still retained a lien upon the unpatented lands, for the cost of surveying, selecting and conveying them, and that until such costs were paid the lands *were not subject to State taxation*, for the reason, as stated, that to permit a sale of them for taxes would destroy that lien, or at least embarrass the Government in the assertion of its right to recover such costs."

And the Court below puts its judgment that the unpatented, surveyed, fees unpaid lands are subject to taxation directly on the

Act of Congress of 1886, and by virtue thereof and only by virtue thereof adjudges that the State of Nevada has the power to tax the *title* of the defendant below to unpatented surveyed lands on which the costs of survey are unpaid, and of and to which the defendant below never had any "possessory claim" within the meaning of that term as used in the Nevada Statutes.

Second. It appearing, then, that the State of Nevada has taxed lands which, but for the Act of Congress of 1886, are not taxable, we submit that such Act of Congress has not made such lands taxable under the Nevada Statutes.

The Act of Congress referred to is in these words: "That no lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by States, Territories and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting and conveying the same, or because no patent has been issued therefor, but this provision shall not apply to lands unsurveyed; provided that any such land sold for taxes shall be taken by the purchaser, subject to the lien for costs of surveying, selecting and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide, and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands. Provided, further, that this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads and in organized counties. Provided, further, that at any sale of lands under the provisions of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto."

Act July 10, 1886, Sec. 1, 24 Stats. at Large, p. 143, Ch. 764.

The opinion of the Court below devotes some space to an attempt to show that this Act of Congress was accepted by the State of Nevada, or that the Act of Congress, together with the State law, formed a sort of composite tax law under which these lands could be taxed and sold.

So far as acceptance is concerned, the only acceptance suggested is that evidenced by the assessment of the lands and the bringing of this suit (Record, p. 33).

The assessment is under *old laws* and of a possessory claim, and is made by ministerial officers charged generally with the duty of assessing property for taxation, and without reference to this Act of Congress.

These officers had no power to accept any Act of Congress.

If such act required acceptance in order to become effective, it seems too plain for discussion that such acceptance can only be made by the State Legislature.

Were it otherwise, the Act of Congress might be accepted or rejected by each assessor in his respective jurisdiction.

The rule is that ratification of acts or contracts can only be made by the same power that could originally have done or made them.

Marsh vs. Fulton Co., 10 Wall., 676–684.
Morawetz on Corporations (2d Ed.), §§ 621, 622, and cases cited.

The analogy is perfect.

This act must be accepted by the State and not by the assessors or the prosecuting attorneys of the counties.

Nor does the claim that the statutes of the State and the Act of Congress together constitute the tax law of the State of Nevada merit serious consideration.

The United States can in no degree enact tax laws for the State.

The tax laws of the State must be perfect of themselves. They must contain all the law for the assessment, levy and collection of taxes, and they must not conflict with the Act of Congress.

There is no room for the doctrine of a reconciling construction, for the statutes are those of different sovereignties, and treat of a different subject matter.

The sphere of the United States law is that of waiving an exemption of certain lands from State taxation.

The sphere of the State is the taxing of such lands in pursuance of and in accord with such waiver.

The true test of the validity of a State tax law on property which but for an Act of Congress would be exempt from State taxation is: Does the State law tax such property in pursuance of and in accord with the Act of Congress?

If it does, it is valid; if it does not, it is invalid.

It is not a question of acceptance or non-acceptance. It is a question whether the State has power to tax what it *has* taxed. In the series of decisions on the validity of State laws taxing shares in national banks this Court has definitely settled the rule as to what is required to make valid State tax laws taxing property subject to taxation only by Act of Congress.

In Bank of Commerce vs. New York City, 2 Black, 620, this Court held that the capital of a bank invested in United States securities could not be taxed.

In Bank Tax cases, 2 Wall., 200, this Court held that the New York Act of 1863, passed after the decision in 2d Black, and which provided for taxing the capital of banks on a valuation equal to the amount of their capital paid in, was equally invalid.

In Van Allen vs. the Assessors, 3 Wall., 573, this Court held that under the Act of 1864, providing that the shares of national banks might be taxed, but at a rate not exceeding that at which State banks were taxed, the preceding decisions did not apply, and that such shares might be taxed, although the capital was invested in United States securities, but also held that, inasmuch as *the State law* did not provide that the tax imposed should not exceed the rate imposed upon the State banks, that the State law was invalid and the tax void.

In 1866 the New York Legislature enacted another national bank tax law, using the precise language of the Act of Congress.

There, however, existed another State law by which taxpayers were allowed to deduct their debts from the value of their personal property, and this deduction had not been allowed in the case of one Williams.

In People vs. Weaver, 100 U. S., 539, this Court held, that although the State law used the same words as the Act of Congress, yet because it did not also provide for the deduction of debts it was invalid.

We thus see how emphatic has been the view of this Court that the State law itself must contain the affirmative provisions which shall make it conformable to the Act of Congress, and that the Act of Congress cannot be relied upon to modify the State law or to co-ordinate itself with the State law.

Now, that this State tax law does not tax these lands and that the State authorities have not taxed these lands in pursuance of the Act of Congress seems clear.

(a) The law under which the assessment is made and the tax levied is the identical law which existed prior to the Act of Congress.

The Court below concedes the invalidity of the State act but for the Act of Congress.

The Court below has *adjudged* that the plaintiff in error had no possessory title, and thus that the assessment and levy *are on the title;* and this Court has adjudged in the cases referred to that such assessment and levy on the title, being an act of the highest sovereignty, would, if valid, divest or impair the title of the United States, and that therefore, such assessment and levy are invalid.

Now, the Act of Congress of 1886 provides that these lands may be taxed, "provided, that any such land sold for taxes shall be taken by the purchaser subject to the lien for cost of surveying, * * * to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide;" also, that United States may become a preferred purchaser, etc.

Where do we find any provision in the Nevada tax law corresponding to these requirements?

The State statute by its terms and as construed by the State Court taxes and sells two interests in lands: 1, the title; 2, the possession.

The State Court has adjudged in this case that there is no possession and that consequently the tax is on and the sale will be of the title.

The Act of Congress says that in such case you may sell provided that you do so on certain conditions. No such conditions are found in the State statute—no such conditions qualify the sale.

If the State statutes and proceedings thereunder had effect as it was intended by the State that they should have effect prior to the decisions of this Court in the Prescott and other cases they would convey the fee or the title. Would the *same statutes* and the *same proceedings* have any other or different effect now?

And if but for the doctrine of the Prescott and other cases the State statutes and proceedings would now have such an effect, surely the *Act of Congress* of 1886 cannot have given them any other or different effect.

Concede that there is no necessity that the State should accept the Act of Congress of 1886. The State has nothing to do with accepting it or refusing to accept it.

It results just the same that the State tax laws so far as these lands are concerned must conform to the Act of Congress—must tax pursuant to and in the manner pointed out by that act.

If now the executive or administrative officers of the State enforce this judgment, how and by what authority can they make the United States a preferred purchaser?

How and by what authority can they by selling to the United States make these lands a part of the public domain so that in future and until again sold and conveyed they shall be exempt from State taxation?

How can these administrative State officers under State statutes which the State courts have held, tax and sell the fee—the stipulation and finding being that the defendant has no possession and no possessory right—sell an estate subject to all liens of the United States which alone is the estate by the Act of Congress of 1886 permitted to be taxed?

This Court has said in N. Pacific R. vs. Trail Co., 115 U. S., 610, that "a valid sale therefor for taxes being the highest exercise of sovereign power of the State, must carry the title to the property sold, and if it does not do this it is because the assessment is void.

"It follows that if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title it is because there is no authority to make it."

That was the effect of a sale under this identical State law before the Act of Congress, and it must equally be the effect of a sale under the *same law* since the Act of Congress.

The Act of Congress does not and cannot modify or amend the State law. The State law must have the same meaning and effect before and after the Act of Congress. Says this Court in same case, 115 U. S., 610: "No sale of land for taxes, no taxes can be assessed on any property, but by virtue of the sovereign authority *in whose jurisdiction it is done.*"

This assessment, under which this suit is brought to enforce a sale, was made under that old law and assessed the title, and, if valid, would pass the title, and is, therefore, void.

It is no answer to say that Congress has allowed these lands to be assessed on certain conditions.

The State has not assessed the lands on the conditions allowed by Congress, but has assessed them on the old conditions never allowed by Congress or by this Court, and the assessment is, therefore, void, and the judgment of the State Court enforcing such assessment must be reversed.

A further fact deserves the attention of the Court.

This Act of 1886 not only provides for certain conditions therein wholly described, but it requires that the sale be made "subject * * * to all liens of the United States, all mortgages of the United States and all rights of the United States in respect of such lands."

Sec. 5 of the Act of 1862 granting these lands, provides that, on default of the railroad company to redeem the subsidy bonds when required to do so by the Secretary of the Treasury, "the said road with all the rights, functions, immunities and appurtenances thereunto belonging, and, also, all lands granted to the said company by the United States, which at the time of said default shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States."

Can the ownership of these lands surveyed, but fees unpaid and unpatented, and the lien of the United States thereon for subsidy bonds, be divested by State taxation? Surely not. And, if not, where is the provision in the Nevada tax law that the sale of these lands shall be subject to this right of the United States which is in terms reserved by the Act of 1886.

Fourth. No lands granted to the Central Pacific Railroad Company can be taxed by a State prior to the issue of a patent.

The grant to the Central Pacific R. R. Co. excludes or reserves mineral lands—not merely the minerals, but mineral lands.

The right and power to ascertain which of the lands, included within the territorial limits of the grant as fixed by the definite location of the line of the road, are mineral and which non-mineral is vested exclusively in the United States administrative officers, and is conclusively proved only by the issue of a patent.

Argument on this proposition seems unnecessary after the decision of this Court in Barden vs. Northern Pacific R. R. Co., 154 U. S., 288. Opinion where the many cases are collected, page 326, *et seq.*

Adams vs. Reed, 40 Pacific Rep., p. 720.

In the case at bar the grant of the unpatented lands is and remains a float until this act of the administrative officers is performed

and a patent issues, for until then no one can say whether any particular acre of land passes or not.

The patent proves it and fixes the title, and nothing else can.

Should the railroad company pay taxes on these lands it may never own or acquire them, and the tax will consequently be paid on property it never has and never can own or possess.

On the other hand, should the company not pay the taxes, and the lands be sold under the judgment appealed from, the title to said lands, if the assessment is valid, would, as we have seen, under the established doctrine of this Court, pass to the purchaser, whether the lands were mineral or not mineral.

The Act of 1886 here has no application.

That act waived exemption from taxation on certain conditions only so far as nonpayment of the survey fees are concerned.

It waived no exemption so far as it had not been ascertained by the proper United States officers whether the lands were mineral.

These lands are assessed to the railroad company as its lands.

The title and not the possession is, as we have seen, assessed.

The railroad company may or may not have the title. No one can tell until a patent issues.

And yet the State assesses and sells the title, and, unless the assessment is void, the title passes.

Is it not clear that such an act on the part of the State will divest the title of the United States to such of the lands as may turn out to be mineral, and for which a patent may be refused by the administrative officers having exclusive jurisdiction of that question quite as much as the title of the United States would have been, or was, divested or impaired in the Prescott and Trail Co. cases?

Nor can it be claimed that the railroad company aside from the payment of survey fees, has a *complete equitable* title, having nothing on its part to do to perfect it.

It not only has not a complete equitable title, it has not any title at all, legal or equitable, and can never acquire any where the lands are mineral, and it can never be known whether, within the meaning of the Act of Congress, the lands are mineral or not until the patent issues.

Aside from a cold construction of the language of the acts, do justice or equity require or allow a man or a company to be taxed on the theory that he or it has received a grant of land from Congress when no one can say whether he has in fact received such

grant; when the essential fact on which alone the grant is to take effect has not been determined, and when it only can be determined by certain designated officers of the grantor?

Nor is the language of Mr. Justice FIELD in the Borden case (154 U. S., 324–5), to the effect that the property could be appraised without including any consideration of the minerals, of any assistance to the defendant in error.

The assessment and judgment here are not on the lands without including the minerals.

They are on all the lands mineral and non-mineral.

If valid they pass the fee, including the mineral and all mining as well as other rights.

This principle was held by the Supreme Court of Utah, in the case of Adams vs. Reed, 40 Pacific Reporter, p. 720, when a deed under such circumstances was held not to fulfill the requirements of an ordinary contract of sale.

It was, I am informed, held by the United States Circuit Court for the District of Washington, in two cases where the Receivers of the Northern Pacific Railroad Company filed bills against County Treasurers to enjoin the collection of taxes.

The decision was made by Judge HANFORD and the opinion was oral.

Thus no lands described in the complaint can be assessed or taxed, save those for which a patent has issued.

Fifth. The judgment should be reversed with instructions to the Court below that only patented lands can be taxed, or at least that only patented lands and surveyed lands on which the fees have been paid can be assessed and taxed under the existing tax law of Nevada.

WHEELER H. PECKHAM,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 31 1895
JAMES H. McKENNEY
CLERK

CASE No. 170

OCTOBER TERM, 1895

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

THE CENTRAL PACIFIC RAILROAD COMPANY,

Plaintiff in Error.

vs.

THE STATE OF NEVADA.

In Error to the Supreme Court of the State of Nevada.

BRIEF AND ARGUMENT FOR THE STATE OF NEVADA

ROBERT M. BEATTY,
Attorney General of the State of Nevada.

HENRY MAYENBAUM,
Of Counsel.

15,159.

Filed 1895

15,159.

CASE No. 170,
October Term, 1895.

In the Supreme Court of the United States.

THE CENTRAL PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
v.
THE STATE OF NEVADA.

Brief and Argument for the State of Nevada.

May it please the Court:

There are two cases in this court, of the above title, on writs of error.

They are numbered 15,159 and 15,160. October Term, 1895, Nos. 170 and 171.

They are tax cases from the State of Nevada, brought here, upon writs of error, by the C. P. R. R. Co., plaintiff in error.

FIRST CASE No. *170*—TAXES, *$3,642.17* FOR *1888*.

The 1st *case* in this court is *No. 170*, October term, 1895. It is a writ of error to the Nevada Supreme Court on a judgment in said State Court for taxes for the year *1888*, levied on the *possessory claim* of the C. P. R. R. Co. to *131,386* acres of *surveyed* lands. The judgment being for $3,642.17, and penalties and costs.

SECOND CASE *No. 171*—TAXES *$2,660.57* FOR *1889.*

The 2d case in this court is *No. 171*, October term, 1895. It is *also* a writ of error to said Nevada Supreme Court on a judgment in said State Court for taxes for the year *1889*, levied on the *said possessory claim* of said C. P. R. R. Co. to the *same 131,386 acres of surveyed* lands. The judgment being for $2,660.57 and penalties and costs.

These two cases, *Nos. 170* and *171*, involve precisely the same question.

Printed briefs and arguments are filed in this court by the State in each case, *mutatis mutandis*,

The briefs and arguments are the same in each case, and, *ab convenienti*, cite the pages and folios of the transcripts in both cases.

The only question in each case is: Could the State legally tax the possessory claim of the C. P. R. R. Co. to 131,386 acres of surveyed land?

There were appeals by both parties to the State Supreme Court in the case No. 170. And there were *also* appeals to the State Supreme Court by both parties in the case *No. 171.*

In each case matters were decided in the State Court which are not before this court on the writs of error. Furthermore, the transcript here in the case No. 171 refers to the transcript in the case No. 170.

It may be well, therefore, for the better understanding of what was decided to state the cases somewhat fully, *but always bearing in mind that, in both of the said cases here, there is but one question or contention, and that is as to the legality of the tax on the possessory claim of said 131,386 acres of surveyed lands.*

STATEMENT OF CASE.

No. 170,

The State of Nevada brought action, in the State Court, against the C. P. R. R. Co., for the amount of taxes assessed by the State of Nevada on the property of the C. P. R. R. Co., in said State, for the fiscal year 1888.

See Complaint, Transcript 170, pp. 9–11, folios 22–25.
171, pp. 9–11, folios 21–25.

Said property so assessed, included the *possessory claim* of the C. P. R. R. Co., to land embraced within the Acts of Congress, granting lands in aid of the construction of a railroad, from the Missouri river to the Pacific Ocean. Approved July 1, 1862, and July 2, 1864.

The title of which land was acquired by the C. P. R. R. Co., by virtue of said Acts of Congress.

See Answer, Transcript 170, p. 15, folios 34–35.
171, p. 11, folio 27.

The lands so assessed are:

Surveyed lands, acres	131,386
Patented " "	24,123
Unsurveyed lands, acres	195,200

See Stipulation, Transcript 170, p. 18, folio 42.
171, p. 16, folio 36.

There is no question here as to the 24,123 acres of patented land, nor as to the 195,200 acres of unsurveyed lands.

The only question here, on the writ of error, is as to the 131,386 acres of surveyed lands.

The State *nisi prius* Court, decided that said possessory claim to said 195,200 acres of *unsurveyed* land, was not taxable, and that the *possessory* claim to said 131,386 acres of *surveyed* land *was* taxable.

See Decision, Transcript 170, p. 20, folio 47.
171, p. 17, folio 39.

The State appealed the case to the State Supreme Court, claiming that the *nisi prius* court erred in deciding that the possessory claim to the 195,200 acres of unsurveyed land *was not taxable.*

The C. P. R. R. Co. appealed the same case to the State Supreme Court, claiming that the *nisi prius* court erred in deciding that the *possessory claim* to said 131,386 acres of *surveyed* lands *was* taxable.

On said appeal of the State, the State Supreme Court sustained the *nisi prius* court and decided against the State, and in favor of the C. P. R. R. Co., and held that the possessory claim of the C. P. R. R. Co. to the 195,200 acres of *unsurveyed* land *was not* taxable, and affirmed the judgment of the *nisi prius* court.

And the State Supreme Court, on said appeal of the C. P. R. R. Co., sustained the *nisi prius* court and decided against the C. P. R. R. Co. and in favor of the State, and held that the possessory claim of the C. P. R. R. Co. to said 131,386 acres of *surveyed* land *was taxable*, and affirmed the judgment of the *nisi prius* court.

Vide decision, Transcript 170, pp. 30-34, fols. 69-71.
171, p. 27, folio 59.

following the decision in the case No. 170. Transcript 170, pp. 30-34, folios 69-71.

The judgment of the *nisi prius* court, affirmed in the State Supreme Court, is:

For Taxes for the Year 1888–

On 24,123 acres patented land.. .. $1,145 84
On 131,386 acres *surveyed land*..... 2,496 33

To which penalties and costs are added.

Vide Judgments, Transcript 170, p. 22, and p. 37.

The State was bound by the decision of the State Supreme Court, holding that the possessory claim to the 195,200 acres of *unsurveyed* land was not taxable. The State was not entitled to a writ of error, there being no federal question available.

But the C. P. R. R. Co., is now before this court, upon writ of error, and claims that the State Supreme Court erred in deciding that the tax on the possessory claim of the 131,386 acres *surveyed* lands is legal, and claims for the purpose of giving this court jurisdiction, that the decision of the State Supreme Court involves a federal question.

The federal question claimed, by the C. P. R. R. Co., is, that the United States has a lien upon this *surveyed* land for the expenses of the surveys of said land, and that it was necessary to construe the *Act of Congress of July 10, 1886; U. S. Statutes at large, 1886, p. 143;* and that the State Supreme Court did construe said Act against the C. P. R. R. Co.

The amount and matter involved in this writ of error is simply the taxes on the said 131,386 acres of *surveyed* lands.

All other matters mentioned in the State Supreme Court decision, are eliminated here.

Vide Decision, Transcript 170, pp. 30–37.
171, pp. 27–34.

There are but three questions that can possibly arise here to be considered by this court:

1. Is there a federal question?

2. If there is a federal question, is it necessary to decide it in order to sustain the decision of the State Supreme Court?

3. If necessary to decide a federal question, was it wrongly decided by the State Court?

I.

Is There a Federal Question?

There is none. The only issue was whether the possessory claim was taxable.

1.

What was decided by the State Supreme Court?

Simply this: That the possessory claim of the C. P. R. R. Co. to said surveyed land is, under the laws of the State of Nevada, taxable.

Can we be mistaken in this?

For the purpose of determining if this be so, please accompany me for a moment, to examine, briefly, the pleadings and issues in the case and the decision of the State Supreme Court.

2.

Complaint.

The complaint of the State alleges, *inter alia:*

That in the year *1888*, the Assessor assessed the *possessory claim* of the C. P. R. R. Co. to said land.

Transcript 170, p. 9, folio 20.
171, p. 14, folio 32.

3.

Answer.

The C. P. R. R. Co., in its answer to said complaint, denies that it had any *possessory claim* to said land, and alleges:

"That said Assessor assessed, to this defendant, a "*possessory claim* of 354,536 acres of land, but this de- "fendant *denies* that, at the time mentioned in the "complaint, or at any other time, or at all, it *ever had*, "*owned, claimed or possessed any possessory claim* to said "lands, or to any part or portion thereof, that it ever "had, or now has, any *possessory interest*, of, in or to "*any of the lands described in the complaint*, or the *pos-* "*session* of the same, or *any part thereof.*"

Vide Answer, Transcript 170, pp. 14-15, folio 34.
171, pp. 11, folio 26-27.

4.

Stipulation.

The case was submitted upon the pleadings and a stipulation.

It was stipulated that the lands described in the complaint are the following:

Surveyed lands..	131,386 acres
Patented lands.....	24,123 "
Unsurveyed lands.....	195,200 "

And that the C. P. R. R. Co. had mortgaged said lands and leased various portions thereof, etc.

Vide Stipulation, Transcript 170, p. 18, folios 42-43.
171, p. 16, folios 36-38.

5.

Issue: Possessory Claim.

Now what is the issue made by the complaint, answer and stipulation, as to this surveyed land?

Only this and nothing more; whether the possessory claim of the C. P. R. R. Co., to said land is assessable or taxable.

The complaint alleges that the *possessory claim* to said land was taxed. The answer denies that the C. P. R. R. Co. had a *possessory claim*. The stipulation determines the number of acres so assessed and taxed, and shows that the C. P. R. R. Co. mortgaged the said lands and leased various portions of it.

The issue then, begging pardon for the repetition, under these pleadings, and stipulated facts, for the State court to decide, as to this surveyed land, could only be this:

Whether the C. P. R. R. Co. had, or had not, a *possessory* claim to said land, taxable under the State law. Accordingly we find, by reading the decision, that the State Supreme Court decided that the C. P.

R. R. Co. had the *possessory claim to said land* and that said *possessory claim* was, under the laws of the State, legally taxed.

Indeed no other right to said land, *except the possessory claim*, could be taxed, for nothing else was assessed.

The title of the land, according to the pleadings, was not assessed and could therefore not be taxed.

6.

Decision of State Supreme Court.

Thus the State Supreme Court, in its decision in this case, speaking through Justice Bigelow, an eminent jurist, says:

" It will be noticed that it is only the *possessory* " *claim* to this land that is *assessed.* * * * It is " evident that the thing attempted to be taxed is " something less than the fee. While in view of the " fact that any sale of Government land for taxes, is " simply null and void,

" McGoon v. Seales, 9 Wall. 23, Black Tax " Titles, Sec. 129,

" it is difficult to understand how any such sale could " ever affect the Government title or its lien upon the " land. It is clear, under the decisions, that it would " not do so here. Against such assessment, whatever " may be said of its validity otherwise, no objection " could be made on the ground that it was an attempt " to subject the property of the United States to [illegible]- " ation. Nothing but the defendant's interest in the " land can be reached by such an assessment. It can-

" not possibly affect the Government title or lien, any
" more than a voluntary sale by the defendant would
" do so.

" Wright v. Cradlebaugh, 3 Nev. 341.
" Forbes v. Gracey, 94 U. S. 762."

Vide Decision, Transcript 170, pp. 33–34, folio 71.
171, p. 27, folios 59–60.

Following the Decision in Transcript 170, pp. 33–34, folio 71.

7.

Decision of the State Court Conclusive.

We need not use any argument here to show that the State Supreme Court was right in deciding that the *possessory claim* of the C. P. R. R. Co. to said surveyed land is taxable under the State Statute.

For, no matter whether the court was right or wrong, upon this point, its decision thereon cannot be reviewed here, upon writ of error, because the decision, upon this point, does not contain a federal question.

8.

Statutes of Nevada.

Under the Statutes of Nevada possessory claims to lands must be taxed.

General Statutes of Nevada (Revenue Laws), Sec. 1080, provides: " That there shall be taxed possessory
" claims to the public lands of the United States, or of
" this State. Provided, that nothing herein shall be
" so construed as to interfere with the primary title
" to the lands belonging to the United States."

General Statutes of Nevada (Revenue Laws), Sec. 1081, provides: That the term real estate "shall in-" clude, claim to, or possession of, or right of posses-" sion to, any lands."

General Statutes of Nevada (Revenue Laws), Sec. 1088, provides: That the Assessor shall assess "claims " to, or possession of, or right of possession to, any " land."

Wright v. Cradlebaugh, 3 Nev., 341.
Forbes v. Gracey, 94 U. S., 762.

Cited supra, in the opinion of the State Supreme Court.

9.

Conclusion.

We are, therefore, irresistibly led to the conclusion that the only issue in the case, as made by the pleadings, was, whether the C. P. R. R. Co. had a *possessory claim* to the said land so taxed, and that the decision of the State Supreme Court, upon that issue was, that the C. P. R. R. Co. had such *possessory claim* to said land, and that such *possessory claim* was taxable by the State.

This disposes of the whole case, and *in this* there was no federal question, and, therefore, the decision of the court was conclusive and cannot be reviewed on this writ of error in this court.

II.

If there is a Federal Question is it Necessary to Decide it in Order to Sustain the Decision of the State Supreme Court?

1.

The C. P. R. R. Co., however, claimed that the title to the land of the company could not be taxed, and that the State Supreme Court intimated that, under the express provisions of the Act of Congress of July 10. 1886, the title to these surveyed lands could be taxed by the State.

2.

The Federal Question Foreign to the Issue.

But that question was entirely foreign, and not responsive to the issue made by the pleadings, for, as we have seen, the issue was solely, whether the *possessory claim* to this land was taxable, not whether the *title* to this land was taxable.

Therefore, the contention of the C. P. R. R. Co., that the title to this land could not be taxed under said Act of Congress, is irrelevant and immaterial, and the opinion of the State Court on this pofnt is *obiter dicta.*

3.

The Federal Question not Necessary to Sustain the Decision of the State Supreme Court.

But suppose the State Supreme Court did hold that this surveyed land was taxable, under said Act of Congress of July 10, 1886, the fact still remains that

it was not *necessary to construe* that Act, or to decide that the title to the said surveyed land could be taxed under the said Act. For, strike out, or disregard that part of the decision, and there still remains a solid foundation, upon which the decision and judgment of the State Supreme Court may safely rest.

This Court has ever strenuously insisted upon the rule, that where the decision of a State Court can rest upon a point decisive of the case, independent of a federal question, raised and decided in the case, adverse to the party contending for it, the federal question is *disregarded*, and this court will not take jurisdiction on that ground.

This rule is amply illustrated by numerous decisions of this court.

I beg leave to cite a few of the later decisions upon this rule:

Sayward v. Denny, 158 U. S., 181.
Beatty v. Benton, 135 U. S., 244.
Hale v. Akers, 132 U. S., 554.
State v. Flint, 152 U. S., 586.
Adams Co. v. Burlington, etc., 112 U. S., 123.
Hagar v. California, 154 U. S., 639.
Eustis v. Bolles, 150 U. S., 361.
Powell v. Brunswick, 150 U. S., 433.
McLaughlin v. Fowler, 154 U. S., 663.
Chapman v. Goodnow, 123 U. S., 540.
Chouteau v. Gibson, 111 U. S., 200.

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Chapman v. Goodnow, 123 U. S., 540.
Chouteau v. Gibson, 111 U. S., 200,
Adams v. Railroad Co., 112 U. S., 123.
Miller v. Anderson, 150 U. S., 132.

Rutland v. Central Vermont 168 U.S.R. 113
Gillis v. Stinchfield 16 S.C.R. 131

The decision of the State Supreme Court, that the tax is on the possessory claim of the C. P. R. R. Co., to this land is conclusive.

Dower v. Richards, 151 U. S., 658.

The pleadings, and the decision of the State Court, are distinctly based on the fact that the tax is on the *possessory claim* to the surveyed land, and not upon the title. This court will look into the case to see if the decision can be sustained outside of the federal question.

Gray v. Coan, 154 U. S., 589.
and authorities supra.

To give this court jurisdiction it must appear affirmatively, not only that a federal question was *presented* for *decision* to the highest court of the State having jurisdiction, *but that its decision was necessary to the determination of the cause*, and that it was actually decided, *and that the judgment as rendered could not have been given without deciding it.*

Davis v. State, 139 U. S., 651.
Cook Co. v. Calumet, etc., 138 U. S., 635.
Johnson v. Risk, 137 U. S., 300.

4.

Conclusion.

It follows that the alleged federal question is entirely excluded from consideration here, in this court. The decision of the State Supreme Court is planted firmly upon another ground, independently of any federal question.

Indeed the C. P. R. R. Co. in no sense represents the United States.

U. P. R. Co. v. Patterson, 154 U. S., 130.

III.

Federal Question not Wrongly Decided.

1.

We do not, however, by any means admit that, even if the case depended on the alleged federal question, that the dictum of the State Supreme Court, upon that question, is incorrect.

On the contrary, there can be no doubt that the title of the said surveyed land is *taxable under the said Act of Congress of July 10, 1886.*

The express provision of that Act is: "That *no land* " *granted to any railroad corporation by any Act of Con-* " *gress shall be exempt from taxation by States, Territories,* " *and municipal corporations, on account of the lien of the* " *United States upon the same for the costs of surveying,* " *selecting and conveying the same, or because no patent* " *has been issued therefor,* but this provision shall not " apply to lands *unsurveyed.*" Sec. 1, U. S. Statutes at Large, 1886, p. 143.

The history and purpose of this Act of Congress is quickly told.

In the case of Railroad Company v. Traill County, 115, U. S., 607,

following the cases of Railroad Co. v. Prescott, 16 Wall., 603,

and Railroad Co. v. McShane, 22 Wall., 444,

the court held that, until the United States was

reimbursed for the expenses of the surveying of those railroad lands, they were not subject to State taxation.

Advantage was taken of these decisions, by the Railroad Companies, to escape taxation on these railroad lands.

To obviate this, Congress passed said Act of July 10. 1886, declaring that those lands shall *not be exempt from* State or municipal taxation, on account of the liens of the United States on the same, for the costs of surveying, etc.

The C. P. R. R. Co., notwithstanding this express provision of this Act of Congress of July 10. 1886, contends that the State could not tax these surveyed lands, on the assumption "that the United States is " the owner, and in the possession of the lands, as to " which it only grants to the State a right to tax."

As to this contention it is sufficient to cite, *Wright* vs. *Roseberry, 121 U. S., 496,* and other decisions of this court, clearly showing, that the grants to the Railroad Companies, under the *Railroad Acts of Congress of 1862 and 1864,* are *in præsenti.*

The companies, under these Acts, have the *present title* to these railroad lands, which would be taxable by the State, except for the lien of the United States for surveying, etc.

The only interest the Government has in these lands, is such lien and that lien, by the *express provision of Sec. 1, of said Act of Congress of July 10. 1886, shall not exempt the surveyed lands from taxation by the State.*

2.

Provisos.

The power given to the State to tax these surveyed lands, was made subject to these provisos:

1. "That any such land, sold for taxes, shall be taken by the purchaser, subject to the lien for costs of surveying, etc."

2. And "that at any sale of lands, under the provisions of this Act, the United States may become a preferred purchaser."

3.

Acceptance by State of the Conditions of the Act.

Counsel contend that, to give validity and force to said Act of Congress, it is necessary that the State, by *Legislative Act*, accept the conditions in said provisos, and that, in the absence of such acceptance, by the State *Legislature*, the United States has no right to become a preferred purchaser, at such tax sale.

First Proviso.

It is plain that, by the first proviso of said Act of Congress, the purchaser, at the tax sale, takes the land subject to the Government lien thereon for surveying, etc.

This protects the lien of the Government on the lands, in the hands of the purchaser, at the tax sale, as fully as in the hands of the railroad company, before the tax sale.

The purchaser, at the tax sale, takes the land *cum onere*.

He must pay the Government the cost of surveying, etc. He stands in the shoes of the railroad company as to the Government lien for surveying, etc.

Thus the lien of the United States is not affected, in the lease, by the tax sale.

The Government has the same rights and remedies against these lands, in the hands of the tax purchaser, as it had against the lands, in the hands of the railroad company, before the tax sale.

Under the decisions of this court, prior to said Act of Congress of July 10. 1886, a tax sale of such land would be void, because of such Government lien.

By said Act of Congress such tax sales on such surveyed lands are authorized, on condition, that such lien shall still continue on the land, in the hands of the tax purchaser.

The right of the tax purchaser, to such land, depends on said Act of Congress. He can, therefore, take the land only upon the conditions of said Act. If he repudiates the conditions, he nullifies his purchase.

He must comply with the requirements of this Act of Congress, to reap its benefits.

If you take anything by a statute, you must take it as prescribed by that statute. You must take it *cum onere*. *Cujus est commodum ejus debet esse incommodum.*

"Wouldst thou Pluto's power invoke,
Thou must bear the Stygian yoke."

Second Proviso.

As to the second proviso of said Act of Congress, counsel assume that the United States could not be a preferred purchaser at a tax sale, under the Nevada Revenue Laws. Why not?

Surely there is nothing ~~under~~ in the Nevada Laws which prevents the United States from being such purchaser. The best bid for the property must be taken.

Statutes of Nevada.

Sec. 225 of the Practice Act of the State of Nevada provides that:

"All sales of property under execution shall be "made at auction to the highest bidder."

There are no restrictions as to bidders at such execution sales, except that said section 225 provides that:

"Neither the officer holding the execution, nor his "deputy, shall become a purchaser, or be interested "in any purchase at such sale."

Section 36 of the Revenue Laws of the State of Nevada provides that the provisions of said Practice Act "Are hereby made applicable to the proceedings "under this Act (Revenue Laws), provided, that the "officer, in selling such property, shall only sell the "smallest quantity that will pay the judgment and "all costs."

If there be a bid, and the United States make an equal bid, then the question might arise who should be preferred.

In such case the bid of the United States would have the preference.

No such *legislative act*, on the part of the State, as is contended for by counsel, is necessary to accept the conditions of said Act of Congress, or to secure the rights of the United States thereunder.

The acceptance, by the State, of the right to tax this land, under said Act of Congress of July 10. 1886, is shown by the fact that this land was taxed by the State, and, therefore, the State, as well as the tax purchaser, is conclusively presumed to accept, and to be bound by, the conditions of said Act of Congress.

The *acceptance* of the conditions of a statute must be presumed with the *acceptance* of a right conferred by that statute.

Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525.

The fundamental principles on these questions of acceptance, and paramount authority of said Act of Congress, are thus ably stated by the State Supreme Court in its opinion:

4.

Opinion of State Court.

" As the sovereign proprietor, Congress has full " power to dispose of the public lands, upon such " terms and under such conditions as it may deem " proper.

" Ironie v. Marhall, 20 How. 561.

" Van Sickle v. Haines, 7 Nev. 261.

" Thus in Gibson v. Chateau, 13 Wall. 99, it is said: " ' With respect to the public domain the constitution " ' vests in Congress, the power of disposition and of " ' making all needful rules and regulations.

" ' That power is subject to no limitation; Congress
" ' has the absolute right to prescribe the times, the
" ' conditions, and the mode of transferring this prop-
" ' erty, or any part of it, and to designate the persons
" ' to whom the transfer shall be made.'

" It will scarcely be denied that the right which the
" United States still has, in this land, is an interest,
" in the public domain, as such, and over which it has
" such full authority.

" Having such authority no reason is perceived why
" the provisos in the Act of July 10. 1886, do not
" come the supreme law of the land, so far as the
" taxation of these grants is concerned. Admittedly,
" Congress has no right to enact laws regulating, gen-
" erally, the assessment, the taxation, or the sale for
" taxes, of property in the different states. But as to
" these lands the United States is both a proprietor
" and a sovereign. The Acts of Congress, disposing of
" them, become general laws binding upon all, because
" all such Acts are specially within the powers con-
" ferred upon it by the constitution.

" There is nothing in the Act of July 10. 1886, indi-
" cating that Congress expected a legislative accept-
" ance by the States, of the terms proposed, and in
" our judgment there is no occasion for such accept-
" ance. The Act is a grant to the States and Terri-
" tories, in which the conditions become the control-
" ling law. The Act and the State Statutes concerning
" revenues must be construed together. All the State
" laws apply to the taxation of these lands, until they
" come in conflict with the conditions prescribed by
" Congress, and then they must give way. Thus con-

" strued we perceive no reason why they may not, " without further legislation, work harmoniously to- " gether. As just stated, the Act of July 10. 1886, is " a grant to the State, granting it the privilege, so far " as the United States is concerned, of taxing a large " amount of property, which, previously, had not been " subject to taxation. It conferred a benefit upon the " State, to the acceptance of which, there can be no " possible objection. Under these circumstances, " conceding it to be necessary that the State should " have accepted the conditions of the grant, in the " absence of a showing that it has refused to do so, " such acceptance is presumed.

" Fort Leavenworth R. R. v. Lowe, 114, U. S. " 525, 27 Kan., 749.

" Again, it would seem that the fact that these " lands have been *assessed* by the State, and that the " State is now in court endeavoring to enforce that " assessment, which without this Act, it clearly had " no right to assess, should of itself, be considered an " acceptance of the conditions therein contained.

Transcript 170, pp. 32–33.

5.

Assignment of Error Incorrect.

The IV assignment of error herein (Transcript 170, p. 38, & 171. p. 35), that " the Supreme Court, " of the State of Nevada, erred in holding and " adjudging that there was no necessity for an accept- " ance by the State of Nevada of the terms and condi- " tions imposed upon the State of Nevada by said

" Act of Congress," is therefore incorrect, for as we have seen, the State Supreme Court decided that the State did accept the said conditions.

This Case in this Court rests solely upon this Assignment.

The State has irrevocably accepted the conditions of said Act of Congress of July 10. 1886:

1. By the acts of its officers, in taxing said lands, under the provisions of said Act of Congress.

2. By the State accepting the benefits and advantages conferred by said Act of Congress.

3. By this very decision of its Supreme Court deciding that the State has accepted the conditions of said Act of Congress.

The State is thus forever estopped from denying, as against the United States, or its grantees, that it accepted the conditions of said Act of Congress *cum oneribus omnibus.*

No such affirmative legislation on the part of the State is necessary. The State, in its constitution, born in the throes of the civil war, asseverates in fervent language its paramount allegiance to the federal government.

Sec. 2, Art. 1, of the Nevada Constitution is thus

" The paramount allegiance of every citizen is due " to the federal Government in the exercise of its " constitutional powers."

And though this were not in the Nevada constitution, yet it is the foundation on which stands, firmly established, the grand superstructure of the Government of the United States, for, Article Sixth of the Consti-

tution of the United States is self executing, and requires no confirmation by State constitution or laws, to make it the *Suprema Lex.*

It ordains:

" Art. 6. This constitution and the laws of the " United States, which shall be made in pursuance " thereof, and all treaties made, or which shall be " made, under the authority of the United States, " shall be the supreme law of the land, and the Judges " of every State shall be bound thereby, anything in " the constitution or laws of any State to the contrary " notwithstanding."

This is sound American constitutional doctrine, and notwithstanding the Greeks and Romans derided an *imperium in imperio* as a political monstrosity, it has worked well, and it has reared a mighty nation from a few patriots, and it will remain the prop of the Government so long as the embers of patriotism shall continue to glow in the breast of the American people.

Now, if the Act of Congress of July 10. 1886, is constitutional, of which there can be no doubt, it is the " supreme law of the land," and no legislation, pro or con, by the State can in anywise affect it.

IV.

Acceptance of Conditions by State not a Federal Question.

1.

Indeed the question here is not as to the construction or validity of the Act of July 10. 1886.

The State Court did not construe the Act differently

from the C. P. R. R. Co. There was no question in the State Court as to the intent and meaning of the Act.

The power conferred upon the State to tax *surveyed lands* was not and could not be questioned. Nor was there any question as to the intent and meaning of the provisos of the said Act.

But the question *was*, whether the State *accepted* the provisos or conditions of the said Act; Whether the State, by its acts, is estopped from denying that it accepted the conditions contained in the provisos.

The only question necessary to be considered and determined was the question of estoppel, and the State Supreme Court decided that the State was estopped, and by its acts did accept the conditions of the said Act of Congress.

This was determined by the State Supreme Court upon the *general principles of the law of estoppel and acceptance.*

This decision of the State Supreme Court in no wise involved the construction of the said Act of Congress. It involved no federal question. Let us see what was the contention in the State Court.

The assignment of error by the C. P. R. R. Co., in its Statement on Appeal to the State Supreme Court, is in these words:

" That the State of Nevada has never, by its *proper* " *legislative department, accepted the terms nor conditions* " *contained in that certain Act of Congress, entitled 'An* " *'Act to provide for taxation of Railroad grant lands, and* " *'for other purposes.' Approved July 10, 1886.*"

See Assignments of Error, Transcript 170, p. 23, 171, p. 20.

Thus it is seen that the contention was that the State never accepted, by its *Legislature*, the conditions contained in the said provisos of said Act of Congress.

2.

The State Court Decided that the State Did Accept the Conditions of the Act of Congress.

The State Supreme Court decided that the State, having accepted the benefits of the said Act of Congress, must be presumed to have accepted its conditions; that the said Act of Congress did not prescribe the *mode* of acceptance by the State, whether by *Legislature*, or otherwise; and that the State did accept the conditions of the Act,

Because—

1. The Act is the controlling law.

2. "Conceding it to be necessary that the State "should have accepted the conditions of the grant, in "the absence of showing that it has refused to do so, "such acceptance is to be presumed."

3. "The fact that these lands have been assessed "by the State, and that the State is now in court en- "deavoring to enforce that assessment which, without "this Act, it clearly had no right to assess, should, of "itself, be considered an acceptance of the conditions "therein contained."

State Supreme Court Decision, Transcript 170, p. 33.
171, p. 27.

It is therefore certain that the contention in the State Supreme Court was not about the meaning or construction of said Act of Congress; nor was there

any contention about the right of taxation conferred on the State by said Act of Congress; nor was there any contention about the meaning or construction of the conditions in the provisos of said Act; but the only contention was as to *whether* said *conditions were accepted by the State.*

The C. P. R. R. Co., by its learned counsel, contended that the acceptance by the State Legislature of the conditions of said Act of Congress was necessary before the State could exercise the right of taxation conferred by said Act.

The State Supreme Court held upon said contention that, if it *were* necessary for the State to accept such conditions, the State *did, in fact,* accept the said conditions and is bound by its acceptance.

The acceptance of the said conditions by the State was proved and shown, not by any federal question, not by any mode prescribed by the Act of Congress, for no modus operandi as to how to accept, or as to the manner of such acceptance *is* prescribed by the said Act.

But the acceptance by the State was shown and decided by the State Supreme Court in its decision, not upon the construction of the said Act, but upon the general principles of jurisprudence of the State, upon the general principles of the law of acceptance, and of the law of estoppels, and upon the general and universal maxims:

Cujus et dare ejus est disponere.

et

Cujus commodum ejus incommodum.

No construction of this Act of Congress could possibly evolve a rule for determining the requirements of a legal acceptance.

The court had to resort, and did resort, to the general law, dehors this Act of Congress, to determine whether the State had accepted the conditions of the said Act.

This determination of the court required no construction of the Act of Congress, and it involved no federal question.

These principles are fully illustrated in a number of cases decided in this court.

I will cite a few recent ones in addition to those above cited:

Marrow vs. Brinkley, 129 U. S., 178.
Powell vs. Supervisors, 150 U. S., 433.
State vs. Flint & P. M. R. Co., 152 U. S., 363.

In the latter case this court, speaking through Chief Justice Fuller, say:

" As its judgment (of State court) rested upon the " decision of a question (i. e. estoppel), which was not " federal, this court has no jurisdiction to review it."

V.

No Room for Construction or Federal Question.

The said Act of Congress of July 10. 1886, authorizes the taxation of the *surveyed* lands, *ex vi terminorum ipsorum*. This Act authorizes such taxation in direct, express and unequivocal words.

There is no room for construction or interpretation.

There was no denial in the State court of any right of the C. P. R. R. Co.

There was not, and could not be, any controversy or question as to the meaning of the plain language of the said Act.

The C. P. R. R, Co., cannot be in good faith in claiming a federal question.

To constitute a federal question, there must be a *construction* or *interpretation* of the Act *necessary*.

There must be *ground* for a *question*, a *construction*, an *interpretation*.

The mere application of a statute, plain and unequivocal in its terms, leaving no room for construction or controversy, can, in no just sense, be held to involve a federal question.

And so, as has been held by this court, where a construction of a statute is necessary, and this court determined it, there can be no more federal question predicated on the statute, upon the point decided.

This Act of Congress is perfectly plain.

He that runs may read it and understand it at first glance.

The first and foremost rule, and the rule of all rules of construction and interpretation, as ancient as Minos, as old as the Pandects, as unchangeable as Everest, is:

"That it is not permitted to interpret, or construe, "what has no need of interpretation or construction."

"*Absoluta sententia expositore non indiget.*"

"*A verbis legis non est recedendum.*"

2 Justinian Inst., 533.
Dwarris' Maxims XVI.
Broom's Maxims, p. 551.
Lieber's Hermeneutics, 119.

"When the various sections of the Statute are clear, "plain and unambiguous, the Legislature must be un- "derstood to mean just what is has expressed. In "such case there is no room for construction."

Odd Fellows' Bank v. Quillen, 11 Nev., 109.

Counsel contend that this Act of Congress requires the Legislature of the State to accept its conditions. That was the only contention of counsel.

The said Act, as is well observed by the State Supreme Court, contains no such provision, and it does not require *legislative acceptance.*

This interpolation, sought to be introduced into this Act of Congress, by the learned counsel, can under no possible rule be permitted.

"Interpretation cannot import words into the "Statute."

"The Judge is only to expound what he finds written."

Bishop on the Written Laws, Sec. 145.

"A Statute cannot be interpreted to mean what it "does not express."

Wall v. Blasdell, 4 Nev., 241.

Perhaps by some psychologic means or hypnotic power, possessed by the learned counsel, they were able to search the deep recesses of the minds of the Congressmen, and there discovered their intention not expressed in this Act of Congress.

But if Congress had any such intention imputed to it by counsel, it failed to express it in any form of words.

If Congress had any such intention, it was strangled before its parturition.

It is a *casus omissus* which the courts cannot supply.

Bishop on Written Laws, Sec. 146.
Broom's Legal Maxims, p. 44.
Pitnam v. Flint, 10 Pick., 306.

Prayer that Judgment be Affirmed in this Case No. 170.

Now, may it please the Court, it is evident that this writ of error was sued out for delay.

The State of Nevada, therefore, prays that the judgment of the State court be affirmed, with 10 per cent per annum damages on the amount of said judgment from the date of said judgment and for costs; and that the Clerk of this court be directed to insert the damages and costs in the mandate to the State court.

Whatever in this brief you find,
"Be to its virtues very kind,
Be to its faults a little blind."

Respectfully submitted,

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